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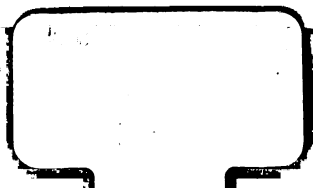
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OF

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ON THE
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OF
CRIMINAL LAW.

By
Caroline Frances Cornwallis.

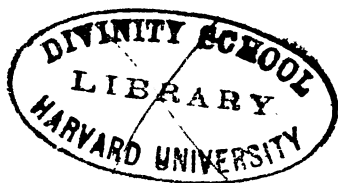
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10.

ON THE
PRINCIPLES
OF
CRIMINAL LAW.

It has been acknowledged for a considerable time, that our criminal laws require revision, and many changes have been made in them with a view to the more effectual suppression of crime, as well as to satisfy the more humane spirit which increasing civilization never fails to generate. Yet these amendments have been more of the nature of a patch on an old garment, or a lean-to against an old building, than what it was natural to wish for—namely, a taking away of useless parts, or a reconstruction of them on the plan of the original fabric.

Law, like other things, has its fundamental principles, and he who would construct or amend a code must first make himself well acquainted with those principles, otherwise he runs the risk of as signal a failure as would be experienced by the architect or mechanic who should form his plans without a due regard to the fundamental rules of his science: which are themselves derived from the great laws by which matter is regulated. The mechanic knows that the tendency of matter is to repose, and that if motion is to be communicated to it, friction, gravitation, the pressure of the atmosphere, and various other causes must be taken into account, and accurately calculated, ere he can judge of the exterior force required to overcome both the original *vis inertiae* and the numerous interrupting causes. He does so, and if he

calculates well, he succeeds in producing the most beautiful results.

The legislator has to deal with a subject of a more difficult nature; he has not merely to study the laws of inert matter and to calculate accordingly: but a fresh element is introduced, whose tendency is not to repose, but action; and the well being of society depends on the giving a right direction to this restless tendency. Laws, it is true, have relation only to the actions which immediately affect the present state of things; but the actions which come under the jurisdiction of law, arise from deeper sources, and have relation frequently to more distant objects than law can take cognizance of. The legislator therefore must study the nature of man:—must investigate those deep sources of action; those ulterior objects which frequently set all legislation at defiance; and must make these impelling forces as much a part of his calculation as the mechanician would do the retarding power of friction, gravitation, &c. They are laws of a nature perfectly different, but they are nevertheless laws of each nature respectively; and cannot be disregarded without more than a *risk* of failure. He who should calculate the force of an organized being upon the same principles as that of a machine, would deceive himself:—he who calculates the actions of an intellectual being on the same principles as those of an animal will be equally deceived:—in each there is a fresh element, and if this be overlooked, the calculation is worth nothing. The regulations required for a nation of baboons would be very different from those required for a nation of human beings.

When complaining of, and seeking remedies for the increase of crime, it would be well if we asked ourselves whether, in our legislation, these conditions have been sufficiently attended to?—whether the element of man's intellectual nature has entered sufficiently into the calculation?—whether, in fact, our laws have not been more fitted to the baboon nation already alluded to, than to a set of beings acting from impulses which no law can destroy or even repress; and led forward by motives which on many occasions gain strength by opposition? The animal crouches beneath the scourge, and is tamed by

it;—man, feeling in himself a power which can set at nought bodily influences, defies pain, and counts himself ennobled by having borne it without flinching. This one fact sufficiently shows that criminal legislation is not the easy task which many suppose it to be. The greatest revolutions the world has ever seen, have been brought about by men who encountered, without hesitation, the utmost rigor of severe laws, not hoping an escape for themselves, but satisfied that their tortures and death were sowing the dragon's teeth from which armed men would spring to sweep away the power under whose influence they had suffered. The legislator must learn to know and to calculate this interior force, ere he can guess what will be the effect of his laws.

I go farther:—the mechanician acknowledges laws impressed on matter which it has received from a mightier Power than his own; and he does not attempt to contravene them:—he calculates rather on their unvarying force, and his results correspond to his expectations. Are we then to suppose that inert matter has laws, and that intellect has none?—or are we to imagine that the material world is regulated by a Power far beyond our own, and that the moral world is left to chance? This would be poor logic. On the contrary, as the mechanician cannot proceed without ascertaining the material laws of the Creator, so the legislator, ere he can give force to his regulations, must ascertain His moral laws. All creation must lead to some object, and if the social be at variance with the moral law, the irresistible tendencies of nature will sweep it away. The legislator, therefore, must be not only acquainted with the powers and impulses of the beings for whom he legislates, but he must also endeavour to penetrate the yet deeper arcana of the universe, and arrive at the *animus*, as it were, of the Creator: for so sure as there is a Creator, so sure also is it that there is some object in creation: and this is no barren abstract doctrine of schoolmen and divines, but a great fact which must enter into all our calculations as a principal element, and which will either strengthen or nullify our code, according as it is in accordance with, or contradiction to, this object.

CHAPTER I.

THEORY OF CRIMINAL LAW.

WHEN we enter on the consideration of a code of laws, three questions naturally arise in the mind: they embrace the whole subject, and the true answer to them forms the science of legislation.

1. By what right does man control his fellow man, and abridge a part of his natural liberty?
2. What is the object proposed by this control?
3. What are the means best adapted to the attainment of the object proposed?

In order to the due consideration of the first two questions, we shall have to dismiss from our minds any foregone conclusions drawn from actual practice, and to recur to the fundamental principles of all law, which are alike for all countries and all time. The modifications which circumstances call for, form the answer to the third, which, if duly given, *ought* to be the practical result of the previous inquiry. Had it always been so, we should not now be calling for reforms and alterations in our code; and although so brief an attempt to lay down the philosophy of law will probably be an imperfect one, still something will have been done if some arrangement be given to the subject, so as to make it assume the form of a science; rather than an empirical practice of applying a remedy to the evil as it arises, without inquiring what has caused it; and thus incurring the risk of increasing instead of remedying it.

I.

By what right does man control his fellow-man?

“The absolute rights of man,” says Blackstone, “considered as a free agent, endowed with discernment to

know good from evil . . . are usually summed up in one general appellation, and denominated, the natural liberty of mankind." What then gives one man or body of men the right to abridge this liberty? Blackstone goes on to say that man, "when he enters into society, gives up a part of his natural liberty as the price of so valuable a privilege." I am inclined, nevertheless, to think that this, though true in the main, is not the exact definition which we require, either of rights or of their limitation. For we shall find that this natural liberty never has existed, from the time that a child was born into the world, since its weakness and inexperience necessarily place it under the control of its parents; and what right can be natural which is not inherent from the first? We should laugh at any one who talked of the natural liberty of an infant, unable even to walk.

We must seek then for some other definition of right than this of mere liberty, and we shall probably find it by an inquiry into the state of this very infant. It is born by no choice of its own; then the Will by which it is constituted as it is, has some design in so constituting it: some aim and end of existence are assigned to it: for I am not here to argue the existence of a Creator; that has been done elsewhere.

If the being, be it what it may, have some end of existence assigned to it, then the accomplishment of that end is its natural right, and so far as liberty of action is needful to this end, it will form a part of the claim of natural right, but no farther. Man being an intellectual animal, the end of his existence can be attained only by the complete development of his nature in both its parts; and he who abridges him of any means by which this is to be effected, does him a wrong; but the parent who abridges the natural liberty of the child so far as to prevent him from maiming or destroying himself, does him no wrong, but the contrary: and this relation of parent and child being universal, and from the beginning, it is plain that unrestrained liberty is not the complete summing up of the natural rights of mankind. But the infant has the natural right of arriving at the due development of the two parts of his nature, corporeal and intellectual,

and from this other rights are derived: he has a right to food, to shelter, to protection from violence, to instruction. These, whilst helpless, it is the parent's duty to bestow, and these, when grown to an age that enables him to make his own claim, and seek his own perfection, he endeavors to obtain, because he feels them to be absolute conditions of animal and intellectual existence.

A right cannot be withheld without doing a wrong: if a man have by his industry provided himself with food and raiment, and another attempts by violence to deprive him of it; the first, possessing a natural right to these things, has also a natural right to resist the being dispossessed of them: if he be not strong enough himself, he seeks the aid of others to make the resistance effectual; and hence arises the first rude notion of social law, as we find it practised among simple tribes, in patriarchal times. Thus, when Lot and his property were carried away, his uncle Abraham armed his servants, and with the aid of three of his neighbors, pursued and rescued his nephew and his effects. War is only another form of this rude justice, continued to our day: it is the repelling violence by violence where the party cannot be made to submit to law.

The right then of abridging the liberty of our fellow men by the establishment of social law, springs out of the very constitution of our nature, which, having a certain end to accomplish, has the right to fulfill it, and consequently to resist any attempt to impede this fulfillment. Man's wants are the same; all need food, shelter, &c.; but the physical strength of the different members of the great human family is very unequal: numbers therefore unite to effect what, singly, would be beyond their power; and some rude form of legal jurisdiction is at last devised to remedy the state of warfare which necessarily arises out of individual violence and individual self-defence.

The form of parental rule is that which man is earliest and best acquainted with, and thus in early times the transition from patriarch to prince was easy. In Asia that form still exists, and the magistrate for the most part is guided by no law save that which is supposed to exist in the heart of every man: but in more northern countries,

where the greater difficulties of soil and climate kept men more dependent on each other for assistance, and consequently in nearer neighborhood to each other, the fathers or elders of the tribe formed a kind of council, and their decisions were held binding on the whole, or if resisted by one or two, were enforced by the rest: and this for the most part was the origin of our unwritten or common law: since among the German nations, from whom we are derived, though there might be one chief for war, who performed the functions more of a general than a king, his decisions as to right were never given merely on his own authority, but were made valid by the consent of his council of old men. And such a decision was likely to be satisfactory where the people were simple, and the relations of society very little complicated; for it was that of men of competent experience and integrity, who were past the age of passion, and not personally interested in the sentence; so that, on the whole, the German tribes, if we take the testimony of Tacitus, were not ill-ruled. This state of things, however, necessarily ceases along with the simple state of society to which it belongs, and then the people usually call for a written code which may meet their new exigencies, and be less liable to doubt than mere verbal decisions handed down by tradition: and thus arises statute law.

II.

What is the object proposed by this control?

If the origin of the right to control our fellows has been truly stated, the object of this control will not be difficult to discover. Society generally, in order to avoid petty wars, takes on itself the protection of those who submit themselves to its ordinances, and these ordinances are therefore directed to the securing those rights which man is justified in defending, because they are indispensable conditions of the development and perfection of his nature. And this right to the development and perfection of his nature is coeval with his very creation: for all things made by an intelligent Will are made with an object, and that object is not accomplished till the thing:

made is perfect of its kind. Man therefore may justly claim this perfection as his first great right, and his double nature calls for the means of a double development. The rights derived from this first and great right therefore are

1. Security in life and limb.
2. Security of possessions requisite to his natural wants.
3. Instruction in childhood and freedom in manhood, sufficient for the development of the rational mind.

These are the securities which ought to be afforded by the control of social law, and it has no other legitimate object than the affording these securities; for man does not submit himself to control merely to please others, but for the sake of being uninterrupted in the pursuit of the great aims of his existence.

The security of person and property against violence,—for no violation of the right of free thought can take place whilst these are secure,—being the great object of social law, it follows that it has no right to inflict penalties for any other purpose than to secure those rights; and its enactments therefore must have in view the prevention rather than the punishment of crime. For it is no benefit to the injured man that he who has injured him should suffer in his person for what he has done, but it is a benefit both to him and to society that the criminal shall be prevented from repeating his offence, and that others shall by his example be deterred from attempting it. On this point Blackstone is very explicit. “The *end* or final cause of human punishments,” says he, “is not to be considered in the light of an atonement or expiation for the crime committed . . . but as a precaution against future offences of the same kind,”* and again he observes that the due measure of punishments will be merely “such as appear best calculated to answer the end of precaution against future offences.” And this principle is recognized in practice to a certain degree, for since it is evident that a young child is incapable of being deterred from ill-doing by the dread of legal penalties, owing to his inexperience, which prevents him from well knowing that there are

* Blackstone, Comm., book iv. c. 1.

any such, it is not until an infant attains the age of seven years that he is by our English law held at all answerable for his actions to society, and if he commit a felony he is not punishable by any criminal prosecution whatever.*

It appears therefore that both rational philosophy and English law equally disclaim the idea of *vengeance* in any procedure of criminal, or, as I have called it, social law; and it may be farther stated that where the crime affects only the individual himself, however deep its dye, social law has no concern with it. The correction of the criminal, in this case, is cared for by another and higher judg-

* But though the principle be thus far acknowledged by English law, it has been strangely confused by the legal practice with regard to the next seven years; for then it is held, that if the attendant circumstances prove that the child had a guilty knowledge that he was doing wrong, he is liable to the penalty of the law; and there is a case in the books of a child between the age of eight and nine years, who was tried and hanged for the crime of arson, committed with feelings of revenge, and executed, it is said, with considerable craft and cunning. But here it is observable that if the object of law be prevention of, not vengeance for crime, the capital punishment of one precocious child which could have no probable beneficial influence on other children, is not justifiable; though some minor penalty, which tended to the reformation of the offender himself, might be not only justifiable but desirable. The want of any acknowledged general principle on this subject, seems to have been felt in another case, which occurred in the year 1748, of a boy aged ten years, who murdered a little girl of five years old, by, according to his own confession, taking her out of bed, and carrying her to some distance, where he killed her with a large knife he had found about the house, cutting and mangling the body in a most barbarous manner. He then buried it in a dung heap, placed the straw which was stained with blood under the body, and covered it up with what was clean. The boy was convicted at the assizes; and a report of the evidence given was submitted to the judges, who unanimously agreed that so many circumstances in the report were undoubtedly tokens of what Chief Justice Hale calls a "mischievous discretion," that the boy was certainly a proper subject for capital punishment. However, notwithstanding this opinion, the boy was reprieved from time to time, and was finally in 1757 pardoned, upon condition of his entering immediately into the sea service.—Vide *Russell on Crimes*, book i. chap. 1.

ment, from whose penalties there is no escape, for they arise from the very constitution of his nature: but social law has only one proper object, i. e., the protection of individuals from a deprivation of their rights by the violence of others. Thus a man may give himself up to drunkenness, but if he stay in his own house and cause no annoyance to others, social law takes no cognizance of his misdoings, though he suffers largely the penalties which the law of nature is wont to inflict on its violators, i. e., loss of health, of senses, and even of life itself. Neither is a man amenable to legal punishment for corrupting the moral character of another person, if the person thus seduced into wrong doing be a willing agent; unless indeed the immorality be of a nature to injure the person or property of others, in which case the instigator suffers the penalty of an accessory to the crime, not of a seducer of innocence: for the law is only framed to prevent men from being *involuntarily* deprived of any natural right, since law, which is the expression of social man's aggregate power, can only represent some right possessed by the individuals who form that aggregate; and we have already seen that the rights which man, for the sake of peace, has vested in the magistrate, are those of self-preservation, and defence from violence: for if any case occur where the aid of the magistrate cannot be called in with sufficient promptitude, then the man resumes his natural right of self-defence, and may, without crime, repel violence by violence.*

* Thus, generally speaking, no provocation, however great, will justify the killing of another, for if the latter have committed an offence, he is amenable to society, to whom the other party is taken to have implicitly relinquished the power of judgment and punishment. But if there be not time to call in the assistance of the law, then the killing is justifiable. Thus if a person attempt to rob or murder another in the highway or in a dwelling house, or attempt to enter a house burglariously by night and be killed in the attempt, the slayer will be acquitted and discharged, and not only the party whose person or property is thus attacked, but his servants and other members of his family, and even strangers who are present at the time are equally justified in killing the assailant. So a man in defence of his house

The above-mentioned principle, that the corrupting the morals of another is not an offence amenable to social law, is especially recognized in our English law respecting the seduction of females: for though a man may thus plunge a woman into the most hopeless misery, and thus commit an enormous moral crime; yet inasmuch as she was a consenting party, social law affords her no remedy for the wrong which it was at her option to avoid, though it inflicts the severest penalty on any who shall dare to effect the wrong by violence. And though the father be allowed in some cases to sue for a remuneration of his pecuniary loss, that is not upon the ground of the sorrow and shame brought into his family by the act of the seducer, but on account of his being deprived thereby of the services of his daughter; to which he is considered to have a legal right.* And though occasionally the consideration of the moral turpitude of the offence may influence the feelings of juries so far as to enhance the damages awarded, yet in fact, this stretch of power in the jury is a deviation from the principles on which social law is founded. And it will be evident on consideration that this limitation is grounded on the immutable principles of morality: for he who abstains from crime *merely* on account of his fear of its ill consequences to himself on detection, is not a virtuous, but a selfish man; and therefore it is useless to attach penalties to moral transgressions as such. The motive, and that alone, constitutes real goodness; and the man will be equally base whether he indulge his passions, or restrain them, solely under the

is justified in killing any one who seeks to dispossess him of it. But if the crime sought to be committed against him be of a less heinous nature than those above-mentioned, as, if his pocket were picked, or his hen-roost about to be robbed, he would not be justified in killing the thief. Wherever the emergency is not so great as to prevent recourse being had to the law, the administering justice by a man's own hand becomes itself an offence.

* If no act of service can be proved, or if the daughter be at the time in the service of another, the father has no remedy whatever. Thus when the crime usually is of the worst kind,—that of the master seducing an apprentice, the common law of England affords no remedy.

influence of fear. The hope of impunity is all that would be needed to make such a man a villain. Legal penalties, therefore, are of no farther avail than as they may tend to defend the worthy from the fraud or violence of the bad: they are useless towards the cultivation of moral worth.

Theoretically, therefore, as well as practically, it is evident that social and moral law must be founded on different principles;* but though virtue cannot be enforced by statute, it is of importance that the enactments of legislators should never be in opposition to that law which is written in man's heart by a yet Greater Legislator: for should this be the case, it will in the first place be inefficient; and next, it will become so odious as probably to involve the overthrow of the government, as well as the contempt of the law. The rules of jurisprudence, therefore, must be in some degree limited, though not altogether guided, by those other and higher rules which no human law can supersede. And in proof of this we shall find,—on tracing the history of those laws which have been most daringly contemned,—that they have either offended against some principle or feeling which man's better part holds sacred; or they have been matters of conventional crime only.†

No penalties have been more severe than those attached to the crime of high treason, yet their savageness has never prevented wise and honorable and amiable men from encountering them: so many indeed of the ornaments of their age and country have perished thus, that were a list of their names to be here given, it would seem rather a selection of the most worthy than an enumeration of criminals. And why is this? Because whilst a government secures men in the enjoyment of their rights, none are tempted to rebel; but if it become corrupt or oppressive, the best are the first to be shocked

* So different, that in social law it is the *intent* to do an act, not the motive on which it is done, which forms the crime. In the moral law the very reverse is the rule.

† As in the resistance to the payment of turapike tolls which gave rise to the Rebecca riots in Wales.

at it, and then it is the part of a disinterested and high-minded man to disregard personal dangers, and throw himself into the breach to win safety and happiness for his country, even at the price of his own life. Treason, therefore, has never been held a dishonoring crime, and its penalties, severe as they are, have been set at nought. The motive, which was felt to be a noble one, took away the odium of a breach of the law.

As severe as, or even more so than the laws against high treason, were those against heresy, and they too were met by a spirit of even more determined resistance: a resistance which, though most generally passive, was so persevering, that finally it vanquished opposition; and these enactments have been discontinued. It was wise to do so, for the man who thinks he has discovered the truth, feels it to be a duty to his God and his fellow-creatures to make it known, and against such a feeling penal statutes are unavailing. From the blood of one martyr twenty spring up. It is evident, therefore, that the moment that social law attempts what is beyond its province, the feelings of mankind rebel against it, and it becomes wholly nugatory. This should be kept in mind in all legal enactments, for it effectually marks the limits within which they ought to be confined.

To sum up in brief this part of the subject, it appears

1. That all existing beings, having some aim and end of existence, have a right to the means for the due perfecting of their nature, so as to accomplish that end.

2. That they have consequently an inherent right to defend themselves against any violence which prevents this; and, if weak themselves, they may, and must seek the aid of others in order to this defence.

3. That to put an end to the warfare thus engendered, which was an evil to all, law was resorted to, and to it was delegated the right of repressing violence, so as to render individual self-defence in great measure needless.

4. That social law therefore directs its enactments towards the securing those under its jurisdiction from acts of violence which may deprive them of the means or the liberty to pursue the ends of their existence. It is consequently preventive, not vindictive.

5. That the moral law, being immutable and unceasing, and enforced by penalties peculiarly its own, inflicted with unerring certainty, even if undetected by man, disdains the support of social law; but social law cannot stand without the aid of the moral law, and if, by unwise legislation, they are ever placed in opposition, social law will be inefficient.

If these principles be acknowledged, and it is not easy to avoid acknowledging them, it remains now that we examine the code of criminal jurisprudence by their aid; and if we do not find its provisions in accordance with them, to point out how they might be made so; and this brings us to the third question.

III.

What are the means best adapted to the attainment of the object proposed?

In the earliest period of legislation there was an endeavor to accomplish two objects in all criminal procedure: *i. e.*, compensation to the sufferer, and punishment to the offender. But, in the very nature of things, the worst injuries are those which admit of no compensation; and then among rude nations arose the idea of the compensation of revenge, and the law inflicted on the perpetrator a penalty of the nature of the violence he had committed. Thus in the very earliest period of law, its true object, prevention of crime, was frequently, if not wholly lost sight of, and a vindictive pursuit of the criminal was encouraged. This vitiation of the first principles of law by substituting revenge for self-defence, has never been entirely effaced from any code; and still, even where the law does not require it, we find sentences frequently influenced by this false conception of the object of criminal jurisprudence, and proportioned rather to the extent of the damage done, than to the nature of the crime attempted.

When the impossibility of compensation to the sufferer became evident, the next attempt was to prevent crime by the severity of punishment; but in proportion as the penalty is severe, the cunning used to evade it is quick-

ened, and the disinclination to prosecute or to convict increased; and if the art of the criminal and other chances should arrive at the point of making the chances of punishment less than those of gain, the penalty loses its terrors from its uncertainty. Capital punishments thus became ineffective, and during the latter end of the last and the progress of the present century, legislators, finding that laws of such severity were both shocking to humanity, and ineffectual in repressing crime, have in different countries devised various expedients as substitutes for the punishment of death.

I. Imprisonment,

II. Forced labor,

III. Deportation to distant colonies,

have been adopted under different codes; but all these expedients are open to serious objections, and still crime increases.

Before we proceed farther, it may be well to take a brief survey of these methods of punishment, and see how far they are adapted to the end which should be proposed in all legal penalties.

I. Imprisonment. This is varied in its forms, and may be subdivided into

1. Simple imprisonment,

2. Imprisonment with hard labor,

3. Imprisonment with a prohibition of communication by speech with other convicts,

4. Solitary confinement.

1. Simple imprisonment, which, till lately, was the only kind of imprisonment made use of in England. In this case the convict, be his offence what it may, falls at once into company with persons of the worst description, for a crowded jail will not allow of classification; and the child committed for some trifling offence, and the hardened thief, or receiver of stolen goods, meet in the yards of Newgate as if the young offender were absolutely sent there in order to be instructed in crime by those who have passed through all its grades,* and this is the first evil at-

* "At one time, early in 1830," says Mr. E. G. Wakefield, in a work I shall have occasion to quote again, "there were half

tending it as regards the young: but even if the convict be not young,—even if he be enough advanced in crime to run no hazard of farther contamination,—still imprisonment merely is useless, unless as a preventive measure, namely, in so far as by shutting the man up you prevent him from pursuing his guilty course during the time he is so confined; for when the term of his confinement is over he returns to the same companions and the same temptations; his body is less fit for exertion, his character is blasted, and his chance of obtaining an honest livelihood decreased by both these circumstances. He is set free in the midst of a dense population, where even the honest can scarcely obtain employment; and no course seems open to him but that from which he has been snatched for a time. What wonder that he returns to it? Observing the inefficiency of this plan, our English legislators have now generally changed it into

2. Imprisonment with hard labor. This is, of course, more irksome to the thief, and therefore may be supposed to deter from crime in a certain degree; but beyond this there is no benefit attending it. The chance of corruption by ill company is the same; the tread mill is an enervating kind of labor which does not prepare a man for working cheerfully when he leaves the prison; and all

a dozen boys in the school yard of Newgate; and during their confinement a man who had not been suspected before, was convicted of receiving stolen goods. This man happened to be placed in the yard next that of the school; and I heard many conversations between him and the boys; and afterwards, when he left the prison, frequently questioned the boys about him. Altogether I learned that for several years past he had been in the constant habit of visiting a coffee shop attached to a boy-thieves lodging house . . . and suggesting to them all sorts of robberies, the plan of which it was his business to concoct. My attention was first directed to him by seeing him give money to the boys; and I soon found that these presents were bribes for their silence. He passed for a religious man with the keeper and chaplain; always attended chapel with an air of great devotion, and generally snatched up a Bible when any officer of the prison was likely to observe him.”—*Wakefield's Facts connected with the punishment of Death*, p. 26. In this instance the tempter had full scope for his seductions *in prison* as well as when at large.

the difficulties which a discharged convict must necessarily have to encounter fall on him with the same weight. These considerations have led to a farther change, and

3. Imprisonment with a prohibition of communication by speech with other convicts, called "The Silent System," has been adopted in the United States of America, and lately in the Model Prison of Pentonville. Here, corruption from the society of other convicts is entirely precluded, and the prisoners receive instruction calculated to enable them to maintain themselves by honest industry when they leave the prison. This is a great improvement on the old system; but this too is not free from weighty objections: for man has been placed by his Creator in a varied scene, calculated to develop all the faculties and capacities of his nature, and the very description and regularity of such a life deprive him of a part of the better discipline appointed for him by his Maker. The *sight* of his fellow-creatures, indeed, is not denied him, but he cannot hold the intercourse which gives man a greater interest in others than himself. The man condemned to silence for a year or two necessarily becomes a selfish man: what is the grief or pain of another to him? He sees it not,—he hears it not,—he may guess indeed that it is felt, but few of us voluntarily contemplate suffering, and the silent man will soon restrict his thoughts to his own affairs merely: the regularity of the employment, and the certainty of food and raiment, leave the mind but small exercise, till at last the pains, or impulses, or appetites of the body become the predominant objects of contemplation, and all the better motives which should lead to better actions, are rather weakened than strengthened by this mechanical sort of life; and the remark made upon monasteries, probably with great truth, that the absence of external communications, and the sameness of the life then led, give the bodily appetites a disproportionate power over the recluse who has nothing to draw his mind away from them, will be in great measure applicable to this system also. It is in the activity of constant and varied occupation that the voice of the animal nature is unheard, and the spiritual has the best chance of recovering its rights; and it is by the colli-

sion with other minds, not by the unvarying return upon our own, that this better part of man acquires power to control the animal propensities and to take that place in creation which the human race was originally destined to fill.

4. Solitary confinement. This is open to all the objections which attend the silent system; but it has also many peculiar to itself. It has been tried in other countries to a much greater extent than it ever was in England, and therefore "its working," as it is called, is well known. None are now ignorant that if it be prolonged, both health and sense fail under the terrible infliction, but it is liable to a still farther, and very grave objection: for though in itself so pregnant with evil, it is not terrible in perspective. Every one has been alone for a few hours, or a day or two perhaps, and he thinks nothing of it: he will be fed and clothed without labor or pains on his part; what cares he for being a little dull? for this is all that he anticipates from solitary confinement. Thus it does not operate to deter from crime by the dread it inspires, and the man probably incurs it with reckless hardihood; it leaves him a maniac or an idiot!

II. Forced labor. This too has been adopted more in other countries than in England: but this again, like solitary confinement, does not *seem* frightful, whatever it may be in fact. Labor is no evil to the working man;—the chains to the ankles do not *appear* to be so great an evil as they really are;—and besides all this, it is an unequal punishment; for the shame of being thus exhibited to the public is nothing to the hardened villain, while it is heart-breaking to the more sensitive offender. Reform of the individual under such circumstances is hopeless: the only safety to society therefore consists in putting on the chains for life.

III. Transportation to distant colonies, which has been mainly adopted in England as a minor punishment, is hardly less open to animadversion; for first, during the very long voyage to Australia, the part of the world which has been selected for this purpose, the impossibility of classification affords ample room for the more hardened to finish the work of corruption in those minds where any

good remains; and next, the punishment itself is by circumstance rendered exceedingly unequal both in its effects on the criminal, and its influence on the minds of others in the way of deterring from crime. For a long time the only object of this kind of punishment appeared to be that of putting offenders against the laws out of sight: they were a defect in the body politic which was to be hidden, and what their condition might be when removed, or what might be the state of society where the main population consisted of such persons, was little considered. Within a short time, however, there has been a considerable amendment in this respect, and Lord Stanley's order, whereby convicts are classified, so as to give them a hope of obtaining benefits by good behavior, has done something towards the introduction of a better system.*

Still, notwithstanding these attempts at amendment, the system of English criminal law is not founded on any general principles which can enable it to work usefully as a whole; in proof of which we have only to consult the credited returns of trials and convictions. Crime has increased in a quintuple ratio as compared with the population, for it appears from official reports that during the four years ending Dec. 31st, 1842, the population had increased only four and a half per cent., whilst crime, as compared with the average of the four previous years, had increased 24·7 per cent., thus giving a clear increase of 20 per cent.

As a system which has existed long is usually reviewed with a degree of reverential affection by those who have grown up under it, I shall endeavor in the two following sections,

1. To show the practical working of the present system of criminal law.

2. To give a sketch of such an amendment of it as may render it conformable to the great principles of all social law.

* Vide Appendix, where the order is set out.

CHAPTER II.

PRACTICAL WORKING OF THE PRESENT SYSTEM.

Of the above-mentioned three classes of punishment, only two are usual in England, for confinement in the hulks is generally only preparatory to transportation: these two are

1. Imprisonment with or without hard labor,
2. Deportation to distant colonies.

The first is allotted to all minor offences, and to some even of a more heinous character. For a first or small offence the imprisonment is usually of short duration, just enough to remove the dread which was felt in contemplating it from a distance, and to introduce the prisoner to able instructors in the arts of depredation. The following passage from the work already quoted offers, it is to be feared, but too true a picture of the evils attendant on the present plan of imprisonment for small offences. "Newgate itself," says the writer, "is the great nursery of capital crime;" but "London abounds with smaller nurseries of petty offences. . . I had the opportunity of strictly examining more than a hundred thieves between eight and fourteen years, as to the immediate cause of their becoming thieves, and in nineteen cases out of twenty it appeared that the boy had not committed his first crime spontaneously, but had been persuaded to commence the career of thieving by persons whose business it is to practise this kind of seduction. The most numerous class of such seducers consists of experienced thieves, both men and boys, who look out for boys not criminal, to whom they represent the life of a thief as abounding in pleasure. The object of these representations is, to obtain instruments with which experienced thieves may commit robberies with less danger to themselves." The writer goes on to describe the nature of the

places where boys are trained for such purposes, and adds, "Let twenty boys selected by the Newgate school-master be from time to time discharged from prison, and every one of them shall straight proceed to one of these pest houses, shall leave it with money in his pocket, and, if watched, shall be seen to pursue the sort of career which I have described. I know the fact to be, that the greater number of the smallest boys discharged from Newgate for want of prosecution or evidence, or after undergoing a sentence of whipping, do instantly proceed to a place of this description, as to their home, and at one time I knew the names and addresses of more than twenty persons who lived by this villainous trade."*

In confirmation of this statement it may be added, that of the 3625 convicts sent on board the hulks, in the year ending Dec. 31, 1841, only 1451 were not known to have been in prison before. The numbers stand thus:—†

Not known to have been in prison before	-	1451
In prison before	- - - - -	487
Previous conviction	- - - - -	1625
Been in Penitentiary	- - - - -	10
Transported before	- - - - -	52
		3625

Of these there were

Under 10 years of age	- - -	3	} 1174
10 to 15	- - - - -	213	
15 to 20	- - - - -	958	
20 to 30	- - - - -	1612	
Above 30	- - - - -	839	

Thus it appears that very nearly two-thirds of the whole number were persons who had undergone a training in crime; and that of the above stated gross number, 1174 were under twenty years of age. In all likelihood, therefore, nearly half the number of those under twenty

* Facts relating to the Punishment of Death, by E. G. Wakefield, Esq., p. 16—23.

† Vide Capper's Reports on Convict Establishments, 1842, page 10.

had already been in prison or convicted one or more times. A more fearful testimony as to the worse than inefficacy of the present system could hardly be given.

It is a fact so well known that I need not here give proof of it, that the greater part of those who incur the penalties of the law are from the poorer classes; we cannot therefore avoid the conclusion that poverty and ignorance are the chief predisposing causes of crime; but poverty can never be entirely removed, and it is to be doubted whether we have yet adopted efficient means for remedying the mischiefs of ignorance. It cannot be too often repeated, that reading, writing, and a slight tincture of arithmetic, with the repetition of some questions and answers learned by rote, do not constitute education. The school may teach these; but the actual education—namely, the formation of habits of thought—remains in the hands of parents, or companions, and, as the world is at present constituted, is in great measure the result of circumstances. The *mode of thinking* of the people has not yet been cared for by the legislature: and the apparent acquirements of children in schools as they are at present managed, serve only to blind the eyes of those who endeavor to ascertain the mental state of the poor; for too frequently under this seeming quickness we shall on inquiry find an ignorance which would surprise those not accustomed to mix with the lower classes. I have within these few years visited workhouse schools, where a regular system of education is supposed to be carried on; but I have universally found that it consisted of mechanical instruction only; the *mind* was not cultivated, and it was a rare thing if any child could go a word beyond the mere formula which he had committed to memory. I have examined children from national free schools, and with deep regret have found myself obliged to come to the same conclusion. It is not therefore by this mechanical education that we can hope to counteract the incitements to crime presented in so many ways to the poor man.

There has been so much party spirit excited by the Act for the amendment of the Poor Law, that I come to this subject with regret, yet in consideration of the increase

of crime during a period of considerable duration, balanced only by a decrease during the last two years, which is quite insignificant when compared to the whole mass,—it is not possible entirely to pass over so large an element in the condition of the poor,* and though I am by no means inclined to assert that robbery is usually attempted in order to relieve want, for I believe the experience of all who have watched the state of the poorer classes will contradict this, yet I believe it to be generally the consequence of the state of mind which want engenders, and to this the mode of administering relief of late years has largely contributed. The poor man has a right to this relief given him by law; but the same law which confirms his right, requires that he shall be put to every sort of inconvenience in endeavoring to obtain it. He must walk long distances, or if the husband be ill, the wife must do so to the neglect of all her home duties: medical advice, when obtained at the cost of walking fourteen to fifteen miles, often comes too late:† or if the

* The following is the table officially given of the criminal commitments during eight consecutive years :

1836	—	20,984
1837	—	23,612
1838	—	23,094
1839	—	24,443
1840	—	27,187
1841	—	27,760
1842	—	31,309
1843	—	29,591

To which may be added a decrease of ten per cent. in the committals during the year ending Dec. 31, 1844, upon a comparison with those of the preceding year. The new poor-law came into operation 14th Aug., 1834. In that year the proportion of crime to population in England and Wales was 1 in 619, in 1843 it was 1 in 537!

† It is a fact within my own knowledge that a poor man having been taken ill with inflammation of the lungs, the attendance of the medical practitioner could not be obtained in less than 48 hours. By that time the disease had made too much progress for medical aid to be of any avail, and the man died almost immediately after.

sick man be removed to the workhouse, the kindly attention of wife and children is denied, and mental is added to bodily irritation, sometimes with fatal effect. If the removal to the workhouse be the consequence of want of work, the parents and the children, the husband and wife are separated; low diet is added to imprisonment,—for whatever name be given to it, such is the confinement in the workhouse, *de facto*,—and the man, wounded in mind and lowered in constitution, leaves the asylum for want, offered by the public, a far worse member of society than when he entered it.

It is in vain that political economists determine to treat of man as of an animal only;—if he *could* be reduced into that state, the world would need that a new race should be created to assume dominion over the most cunning and ferocious of all animals; but by the rule already laid down, in our legislation we must consider him in his double capacity; and those very domestic ties which he finds so rudely severed by the law,—that very feeling of natural justice which teaches him that sickness or lack of employment is no crime,—are the safeguards of the well being of society, and were implanted in man's heart by that Greater Legislator whose decrees we can never break without suffering the penalty which HE has attached to their breach, and which is never remitted. Nine years have now passed since the experiment was made, a clear increase of forty per cent. in the number of crimes committed has coincided with,—I will not say, been caused by it;—but nevertheless the character of the crimes perpetrated seems to tell of such a kind of demoralization as the philosopher would have expected from such a law. The man of the workhouse is sinking into the sensual ferocious animal.

With all these causes of crime at work, can we expect that an imprisonment of six months will have any effect in deterring from crime? The man who is guilty of nothing but his poverty, suffers six months' imprisonment during the winter if he cannot obtain employment, or happens to be ill: and his diet in the jail—(and when the finer human affections and motives are crushed this becomes a consideration) is better. Thus a man who has

once tried the workhouse, will probably the next time prefer the jail, and will commit some trifling theft or offence in order that he may obtain admission there for the sake of a maintenance: but he comes out instructed in robbery as a trade; and thus the law has arranged a set of grades for the perfection of crime; the workhouse first, the jail next, then a penal colony. What the working of this second part of the system is I shall now endeavor to show.

2. Deportation to a distant colony is the penalty of the greater offences, (with the two exceptions of murder and high treason,) and of the repetition of smaller ones, since a criminal who has been frequently convicted of larceny, is usually sentenced to transportation for a term of years at last. This punishment which from its very nature, must fall with very unequal weight on different kinds of offenders, is indiscriminately inflicted on men of all ranks and all characters. Let us consider its operation. In the case of forgery, the law has generally to deal with a man who has displayed great ingenuity in accomplishing, and deriving a profit from his fraud, and this ingenuity has been exercised in robbing his fellow-creatures of their property with comparative safety to himself. He is sentenced to transportation for life. He enters a new colony where talent is sure of making its way; his fertile invention is soon at work to ameliorate his condition, and ere many years are over he is in the possession of property and is a person looked up to in the country which is become a new home to him. There is little to deter from crime in such a prospect.

On the other hand turn to the rick burner of Suffolk or Norfolk. A laborer whom neither his parents nor society has taught the simplest rudiments of knowledge, but whose body is vigorous and capable of labor, asks for work and can get none, or if any, at wages insufficient to feed and clothe himself and his family. He is starving in the midst of surrounding plenty; the squire of his parish is living in affluence; in the farmer's yard are goodly corn stacks; and reasoning in a dull illogical way he connects his own wretchedness with the abundance of those whom he looks to for employment and protection, or perhaps in

his suffering he considers it as caused by ill will on the part of his superiors in station, and he burns down the barns. He also is sentenced to transportation for life.

Surely the state of these two individuals differs as light does from darkness, yet by law the punishment is the same. The only ground that can be imagined for this equality of punishment is, that the consequences of the crime as felt by society are as great in the one case as the other: a computation of punishment formed somewhat in this manner: A. utters one hundred pounds worth of forged 5*l.* notes, and therefore deprives various members of our society of property to that amount in pound sterling. B. destroys a rick of the value of one hundred pounds, and thus deprives a member of our society of property to that amount; therefore the punishment which society shall inflict upon B. shall be precisely the same as that inflicted upon A. What *principle* is at work here? Not one which by punishment seeks to prevent others from committing a similar crime and at the same time tries to reform the criminal, but on the contrary, something very like retributive vengeance which inflicts a penalty upon the offender exactly commensurate with the wrong which society has suffered. But this, as we have already seen, is a vice in social law.

We may take another instance of a yet different kind, in which by law a like penalty is inflicted. C., a man of strong animal passions, who has been unaccustomed to control them in any way, inflicts for their gratification, or in revenge of some supposed wrong, "a grievous bodily harm" upon the person of a fellow man. C. may be an ignorant or an educated man, for although the cultivation of the intellectual faculties doubtless tends to curb the animal nature, when its uncontrolled indulgence does injury to ourselves or others, yet sometimes we see great mental energy combined with very ill-regulated animal appetites. More frequently, however, it is the ignorant man who sins against the law which protects the persons of individuals. However, be he ignorant or not, it is clear that he differs much, both in nature and habits, from either A. or B., and again it is difficult to recognize any principle but that of vengeance in the punishment inflicted, for it

is not in the wildness of a new colony that a sufficient curb can be put on the man of uncontrolled passions.

Let us trace the consequences a little farther. A. has received sentence for forgery; B. for the fire he has raised; C. a man of some education, and who has been convicted of maliciously maiming another; and D. a being who in his uncultivated nature is but little above the level of the brute, has violated the person of a woman, have both received the same sentence as the two former. How will the ranks of persons predisposed to commit these several offences, and to whose minds and hearts the sentence passed upon these individuals should speak so as to prevent them from committing the like crimes, be affected by the judgment? In the consciousness of possessing a talent and a cunning sufficient to place them, after some short interval of hardship and discomfort, in a station far above all pecuniary want in a new society; with well-remembered instances present to their minds of convicts of a like stamp living in luxury in New South Wales upon the fortunes they have amassed since their transportation, the sentence produces little or no deterring influence upon the class from which the forger has been taken.

Let us now turn to B. the rick-burner: his companions are in court, his fellow-laborers when employment could be obtained, and to them he is very likely to be known as one who is capable of doing a kind action for a friend, and who loves his wife and children, and is beloved by them: the jury has found him guilty, and the judge in his anxiety to prevent a repetition of the crime has passed upon this unhappy man the severest sentence the law allows him to inflict. At one stroke all these tender ties are severed, he receives the fiat in mute despair, and in his agony swoons away.* In this case the sentiment produced among bystanders is that of compassion for the offender, whose fault is almost forgotten in the extreme severity of the sentence, and the former companions of the prisoner leave the court with feelings of indignation

* This is no exaggerated picture. It occurred in the spring of 1844, at the trials of the rick-burners in Suffolk.

and perhaps of conceived revenge against those whom they consider as their oppressors, restrained only by the basest of all possible motives, fear. And to the offender what is the consequence? Every tie that bound him to life is broken,—what matters it to him whether he conducts himself well or ill in the colony whither he is sent? he is there for life, he cannot hope to rejoin wife or children any more—he goes forth a reckless man, rendered worse instead of better by the sentence of the law, and the wife who is left behind with a large family to struggle against the world for a maintenance, with only the Union house, or starvation before her—not allowed a divorce in consequence of a sentence which severs her from her husband as effectually as death—is too frequently not less deteriorated in her moral character than the husband, by the stern sentence of the law.

C. perhaps has friends in good circumstances: he very soon finds means to enjoy such luxuries as the colony affords, and it is well known that he will do so.* Where is the deterring influence in this case?—the criminal is able to defy the law!

D. is sentenced, and leaves the court muttering curses against the judge; he is removed in due time to Australia, and employed upon the works in a government gang; he repeats his offence, perhaps, or is guilty of some other act of violence; he is again tried, and sentenced to the severer discipline of Norfolk Island. What this is in its results may be best understood from the evidence of the Rev. W. Ullathorne, D. D., a Roman Catholic priest, as given before a Committee of the House of Commons.

“There was a conspiracy in 1834 among the prisoners to take the island from the military, and to obtain their freedom a skirmish ensued, one or two persons were slain upon the spot, and I believe eleven or twelve were dangerously wounded; six or seven died of their wounds afterwards a commission was sent from Sydney to try them (the conspirators). In this case thirty-

* A lieutenant in the army sentenced to transportation for a shameful outrage on a young lady, was seen driving his curricle in the streets of Sydney very soon after his arrival in the colony.

one were condemned to death. Some six months afterwards I proceeded from Sydney for the purpose of attending those who were to be executed, and on board the same ship was a Protestant clergyman likewise. On my arrival I immediately proceeded, although it was late at night, to the jail, the commandant having intimated to me that only five days could be allowed for preparation, and he furnished me with a list of the names of the thirteen who were to die, the rest having been reprieved. . . . Upon entering I witnessed a scene such as I certainly never witnessed in my life before. The men were confined in three cells: they were then mixed together; they were not aware that any of them were reprieved. I found, so little had they expected the assistance of a clergyman, that when they saw me they at once gave up a plot for escape which they had very ingeniously planned, and which might, I think, have succeeded so far as their getting into the bush. I said a few words to induce them to resignation, and I then stated the names of those who were to die, and it is a remarkable fact that they one after another, as their names were pronounced, dropped on their knees and thanked God that they were to be delivered from that horrible place; whilst the others remained mute and weeping. It was the most horrible scene I ever witnessed." The same gentleman, corroborated by other authorities, represents that the convicts are driven to despair; that they have been known to commit murder for the sake of ridding themselves of life, and according to the expression used by one of the convicts himself, "When a man comes to this island he loses the heart of a man, and gets the heart of a beast."* Thus we see that, as if it were determined that he who entered that abode should have no hope left, there was not even a chaplain appointed by the government to speak words of admonition and comfort to the wretched men suffering a "punishment harder than they could bear."

I think that after this statement, I am justified in as-

* Papers relative to Transportation, &c., Session 1839. No. 582, cited by Abp. Whately.

suming that we are yet very far from having adopted the best means for attaining the object which social law has in view, *i. e.*, the prevention of crime, and that there is great need for a revision of this part of our laws.

It was natural to hope that the commissioners lately entrusted with the revision of the criminal law, would have taken the system of penalties also into consideration; but though they have suggested some few alterations, they have not thought fit to offer any observations on the tendency of the system generally. Thus though the barrister and the judge may be saved some trouble by the codification of our laws, the citizen who asks for security of life and property; or the philanthropist who asks that man shall be trained to virtue,—not to vice;—must remain as little satisfied as before; the question of how the great object of criminal law, *i. e.*, prevention of crime, can best be effected, is yet far from solved, and the subject requires to be taken up *de novo*.

As a preliminary step in such an inquiry, it becomes needful to consider whether the offences which are constituted such either by statute or common law, are all of a nature which can be clearly recognized as coming within the province of social legislation; for we have already seen that law must borrow much of its efficacy from its agreement with that ineffaceable common law which is written in man's heart by the finger of his Creator. And here it was to be hoped that as the attention of her Majesty's government had already been given to the codification of our criminal law, some endeavor would have been made on the part of the commissioners to remove statutes and practices which are no longer in keeping with the habits of the time: but in dividing the offences at present cognizable by our criminal courts into chapters, with a view to their classification, they have placed at the head two, which we have already seen, (§ II.) cannot be considered as either useful or expedient in the present age. These chapters are headed

1. Treason, and other offences against the state.
2. Offences against religion and the established church.

On the first of these the commissioners observe, "The first great class which comprises treasons against the

sovereign and the state, requires no remark; the crime of treason is, by its tendency to destroy the bonds of civil society and produce a state of anarchy and misery, clearly distinguished from all others. It falls within the description of the *crimen læsæ majestatis* of the Roman law, and by whatever name or whatever circumstances it be described, it must constitute in every system the first and highest offence known to the law."

Now though it may appear almost presumptuous to impugn the dicta of men who have devoted long and anxious attention to the subject, yet, if the principles already laid down be true ones, it is unavoidable: for if social law be founded upon them, then it is impossible to overlook them in any one or two instances without serious injury to the system, as a whole, which shall win the respect and consequent obedience of a nation. Let us consider the matter farther. The sovereign, considered as a human being, has the common natural rights of a human being, and no more, and with whatever more of sanctity and dignity public opinion may have hedged him round, it is clear that it is only as the embodiment of the law itself, of which he is the dispenser: and the law affords him protection in that judicial capacity by a fiction—"the king can do no wrong"—only in order to prevent the evils which would arise to the body politic were the king made privately answerable for the acts done in his name according to the law. But if the king attempt to act in opposition to the law, no one in these days will say that the resistance to such acts is wrong, but the contrary: though if such resistance be unsuccessful, the leaders of it, according to the still existing statutes, must expiate their crime by death. Yet if it be successful, as in the case of the partisans of the Prince of Orange in 1688, those same men, who, if unsuccessful, must have been executed as traitors, will be lauded, and justly so, as the saviours of their country. A strange anomaly, which at once removes the law of treason from among those founded on the natural rights of man, which, as we have already seen, form the basis of all social law. For man cannot delegate a right which he does not possess, and the power of exercising control over any man, or body of men,

beyond what is necessary for the maintenance of natural rights, has never been among the rights belonging to man as a species, and therefore can never properly be delegated to the law. Nor are the treason statutes needful; for he who commits violence personally or by deputy is liable to the penalties of the law, and can only avoid them, either by an act of indemnity afterwards granted by those who consider the benefit attained by such violence to be great enough to justify the dispensing with the strictness of law on that one occasion;—or by becoming great enough to be above the law, and in that case it should be remembered that he who cannot be made to submit to the penalty for murder or robbery, would not be more amenable to the penalties of treason. Those slain in a warfare not legally authorized are murdered; and the murderers may be prosecuted for what they have done; those who levy forced contributions are robbers, and must abide the consequence: those who assemble in numbers likely to occasion a breach of the peace, are punishable for a riot if they do not disperse when warned to do so. There is no part of treason, therefore, which is not provided for by the common criminal law, except that of the culpable imagining; but that, if it proceed not to culpable acts, will hardly now be held a crime.

When the statutes of the twenty-fifth of Edward III. were passed, society was very differently constituted: the penalties attached to robbery and murder were neither well defined nor rigorously enforced, and a powerful noble could rob his poor neighbors with impunity: the savage treason laws therefore were but the natural produce of a semi-barbarous age, where the law itself being weak, the hand of the monarch was made strong in order to execute it. That period is past, and the last successful traitors in 1688 ought not to have left a law in existence from which they themselves had so narrowly escaped, to clutch heads as noble as their own in after times.

There is yet another reason for the repeal of the treason laws: they are worse than useless. It has already been noticed that it never was held a dishonoring crime, and we have of late years seen vagabonds, who had no other way of attaining celebrity, attempt the sovereign's life by

way of obtaining the "pride, pomp, and circumstance" of a trial for high treason. This was made manifest by the effect at once produced by the wise enactment on occasion of those attempts on her present majesty. The moment the celebrity of a traitor was taken away and the offender was subjected to the dishonor of a whipping, the crime was attempted no more.

It appears, then, that in some cases the treason statutes are superfluous, in others absolutely mischievous, in others that they have proved nugatory, as in that part of them relating to the king's compassion which, it is well remembered, could not be executed in the only case since Henry VIII. in which any proceeding of this kind was attempted, and that thus a fair case is made out for their repeal. I need hardly remind the commissioners that the Roman law which they allude to was the support of a tyranny so intolerable that every good Englishman must pray that the *crimen læsæ majestatis* may never be heard of in England. It should sleep with the Cesars, of whom alone it was worthy.

To the second division, namely, "offences against religion and the established church," I must in like manner object; for social law, as we have already seen, can take cognizance only of injuries done to the members of the society under its protection in their persons or property. We must therefore inquire what injury is done by the offender against religion or the established church to the other members of the society of which he forms one. "He who impugns the Christian religion," says Blackstone, "is punishable at common law . . . for Christianity is part of the laws of England,"* and he justifies the punishment of such offenders by saying that the sanctity of an oath, on which the evidence in courts of law is dependent, will be weakened and indeed rendered wholly nugatory where the person taking it has no belief in the existence of a God, or a future state; and thus the offence must strike at the very root of all social law. But with all due deference to so great an authority, it may be questioned

* Comm., book iv. c. 4.

whether the mere *outward* profession of a belief gives any security to society, and what more can human laws enforce? Many a voluptuary,—an ambitious man,—or a hard, griping miser, thinks as little of, and cares as little for a future state, as the man who openly professes his disbelief; is the oath of the one at all more binding on him than that of the other? But it will be said that the open profession and promulgation of this disbelief injure by its example. Yet, though it be of infinite importance to navigation that the Newtonian system of astronomy should be believed and acted on, who thinks of punishing the clown who may obstinately assert that the sun moves round the earth? No one who is able to judge for himself believes this, or is in the least danger of being seduced into believing it: and are we so little convinced of the truth of revelation as to dread that those who really believe it will give up their conviction the first time that they are asked to do so? Certainly among those who call themselves Christians there are numbers who are so only in name: these doubtless may easily be led into any extravagance; but it may well be questioned if the cause of religion gains anything by the example of a man who attends regularly on holy ordinances yet scruples not to corrupt his neighbor's wife or defraud him of his property in the meantime. The man who professes unbelief is far less dangerous to society than this kind of religious hypocrite, for the infidel at least carries his colors at the mast head and deceives no one. The injury done to the believer is none; for the good Providence of God cannot be quenched by the breath of man; and nothing more is requisite to make the teaching of irreligious doctrine wholly ineffectual, than the due instruction of the people, so that they may be capable of believing on conviction, without which religion becomes superstition, and is as useless towards guiding the life and conduct as atheism itself. But it is easier to imprison one man for teaching false doctrine, than to instruct thousands in the truth, and thus legislators become intolerant through mere indolence: a poor excuse for so glaring a departure from the great principles of all human law.

If indeed unbelief should arrive at that point of *fana-*

ticism which leads to interrupting and annoying others in their worship, this is an offence in law; for it is an act of outward violence, and may justly be restrained; since otherwise the party attacked would be forced into defending his great right of adoring the Creator, and a breach of the peace would ensue, which it is the especial business of social law to prevent; but until it arrives at this point, no one is injured, nor has the law any just cause for interference. For as none can *compel* the mind to receive an opinion, and as we have already seen that seduction to evil is not a crime punishable by social law, if the seduced party be a willing agent,—so the atheist, let him preach his doctrine as he will, commits no legal offence: for he may observe the moral law written in his heart, and submit to the government of the country as well as another; and his converts, if he make any, will not *necessarily* do otherwise. If indeed any one should preach that murder and robbery were to be practised, and were to make converts to such a doctrine, society would have a right to interfere to prevent such preaching, because it has a direct tendency to encourage the kind of violence which the law is intended to repress: but we are not to assume this constructively, and say that if the doctrine of future rewards and punishments be taken away such consequences must of necessity follow: for though among such as are not influenced by higher motives, a vague dread of the future may restrain from crime sometimes, yet the higher tone of mind is that where a man honors his own nature too much to degrade it, and loves good for the sake of the good itself rather than for the reward attached to it. Such a man may act nobly though he look for no reward; and therefore we cannot in justice attribute a consequence to an opinion which the holder of it disclaims, and which his life may possibly disclaim yet more effectually. But if the opinion should beget the conduct we expect, then the law will take cognizance of the crime without asking what the opinion was which engendered it: for, as has been already observed, it is held, and justly held by high legal authorities that the intent to commit the crime, not the motive or opinion which caused that intent to be formed, is the part of the offence which falls within the pro-

vince of criminal jurisprudence. God judges the motive, —man the act, and this is as it should be; for the small knowledge possessed by human beings hardly enables them to read their own motives aright; still less can they judge those of others.

I have argued the point here upon its general bearings, without referring to the particular offences relating to religion marked out by the law, and as if they were all included under one general head; though the chief of the prosecutions which have occurred of late years, wherein religion was held in a manner the plaintiff, have been included under the head of blasphemous libel. But it matters not under what form these prosecutions are instituted: religion cannot be taught by law. God is able to vindicate his own rights without the assistance of the judge; and it should not be forgotten by those who advocate the system of maintaining the right faith of the people by pains and penalties, that when the Lord of life was contented to offer up the mortal clothing which he wore, for the ransom of his enslaved creatures, it was under a charge of blasphemy that he suffered. Nor was the charge without foundation if it were allowed to shortsighted man to regulate the intercourse between the Creator and his creatures, by his own, as he thinks, *orthodox* creed. The priests and rulers of the Jews had a divine revelation on which their polity was founded; a fresh teacher arose, a poor man, who drew a large party after him, and who professed his intention of making a complete change in the government and religion of the state. Instead of inquiring if his doctrine might not perchance be true notwithstanding its novelty, or if indeed they might not be found at last to fight against God, they shut their ears to all reasoning, assumed that they knew better than the ignorant people who followed him, and he was executed as a traitor to the Roman Emperor, and a blasphemer against the Jewish religion. Let it be remembered too that the Reformation of the Church was opposed as an unorthodox, and almost a blasphemous movement, till it had proved successful, and that almost all the benefits of civil and religious liberty which we now enjoy sprung from determined heresy on the one

hand, and successful treason on the other. A sufficient reason, one would imagine, for removing both from the statute book and the codified common law two classes of offences, which to-day may be the greatest of crimes, to-morrow the most glorious of victories over tyranny and prejudice. Real crime does not so easily change its complexion.

There are two other points which do not occupy so conspicuous a place in law as the great classes of offence which have just been noticed, but which yet require some consideration before we go on to the classification of crime and punishment. One of these is the liability or non-liability of a woman to a criminal process during her state of coverture. Nothing can more clearly mark the want of some fixed principles of law than the uncertainty which prevails on this head. Generally, if any certainty can be elicited from so much of doubt and contradiction,*

* Lord Hale lays it down, "As to the civil subjection of the wife to the husband, though in many cases the command or authority of the husband either express or implied doth not privilege the wife from capital punishment for capital offences, yet in some cases the indulgence of the law doth privilege her from capital punishment for such offences as are in themselves of a capital nature wherein these ensuing differences are observable.

"1. If a feme covert alone, without her husband, and without the coercion of her husband, commit treason or felony, though it be but larceny, she shall suffer the like judgment and execution as if she were sole; this is agreed on all hands.

"2. But if she commit larceny by the coercion of her husband she is not guilty, and according to some, if it be by the command of her husband; which seems to be the law if her husband be present, but not if her husband be absent at the time and place of the felony committed.

"3. But this command or coercion of the husband does not excuse in case of treason, nor of murder, in regard of the heinousness of these crimes.

"4. If the husband and wife together commit larceny or burglary, by the opinion of Bracton both are guilty, and so it hath been practised by other judges; and possibly in the strictness of law, unless the actual coercion of the husband appear, she may be guilty in such a case; for it may many times fall out that the husband doth commit larceny by the instigation, though he cannot in law do it by the coercion of his wife; but the latter

a married woman charged with committing a criminal act, in case her husband be present at the time, is held to have acted under his coercion, and is on that ground entitled to an acquittal excepting the crime charged be treason or homicide. Now, in this small part of law as laid down by the highest authorities, we find numerous deviations from true principles.

Duress, inducing a just and well-grounded fear of death, or of grievous bodily harm, is held a sufficient excuse from the penal consequences of any act done under its influence. If this principle be a just one it is applicable in all cases; if unjust, in none. Upon what ground is this applied to a married woman under certain circumstances, and only to married women at all? A feme sole (unmarried woman), although her inferior physical strength renders her liable to be in duress to any man, being present, who should threaten her with bodily harm, must prove that such threats were used, ere the law will excuse her; the married woman is held to be coerced by his mere presence—at least some are of that opinion—though there may be no proof of menace; but if he be not present, though previous menace may have been the inducement to the commission of the crime, she is liable, notwithstanding her coverture:—and in those crimes which of all others are most likely to lead a man to use his superior strength to compel assistance from his wife, she is also liable, even though he be present.

practice hath obtained, that if the husband and wife commit burglary and larceny together the wife shall be acquitted and the husband only convicted.”

And in Hawkins' Pleas of the Crown, ch. i., it is laid down that

“S. 9. 1. A feme covert is so much favored in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company with, or by coercion of her husband.

“S. 10. Neither shall she be deemed accessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her.

“S. 11. But if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery in company with or by coercion of her husband, she is punishable as much as if she were sole.”

It is not easy to discover what is the false principle which lies at the bottom of all these contradictions. Probably most of the statutes and practices of law regarding the female sex originated in their lack of physical strength: for in a semi-barbarous age it was almost equivalent to the having no rights if the possessor were unable to maintain them with a strong hand; and most of our laws having had their origin in such times, the husband claims and is still allowed by English law the power of inflicting both imprisonment and personal chastisement on the wife.*

* The law respecting the control which is given to the husband over the wife has recently been laid down by Mr. Justice Coleridge in the elaborate judgment given by him *in re Cochrane*, which is to be found reported in 8 Dowling's P. C. 630. A writ of habeas corpus had been granted to the wife, who having been brought into power of the husband by stratagem, had since that time been kept in confinement by him. By the return to the writ it appeared that the parties had lived together for about three years immediately after their marriage in terms of apparent affection, and had two children; that in May, 1836, Mrs. Cochrane withdrew herself and offspring from his house and protection, and had resided away from him against his will for nearly four years. While absent from her husband, Mrs. Cochrane had always resided with her mother, nor was there the slightest imputation on her honor. In ordering her to be restored to the husband, the learned Judge, after stating the question to be, whether by the common law, the husband, in order to prevent his wife from eloping, *has a right to confine her in his own dwelling-house, and restrain her from her liberty for an indefinite time*, using no cruelty, nor imposing any hardship nor unnecessary restraint on his part, and on hers there being no reason from her past conduct to apprehend that she will avail herself of her absence from his control to injure either his honor or his property, stated that there could be *no doubt of the general dominion which the law of England attributes to the husband over the wife*; in Bacon's Abridgment, title *Baron and Feme* (B), it is stated thus: "The husband hath by law power and dominion over his wife, and *may keep her by force within the bounds of duty, AND MAY BEAT HER*, but not in a violent or cruel manner..." "Although expressed in terms simple almost to rudeness," continues the Judge, "the principle on which it (the law) proceeds is broad and comprehensive; it has respect to the terms of the marriage contract and the infirmity of the sex. For the happiness and honor of both parties, it places the

But as this power on the part of the husband places the wife in the condition of a slave deprived in great measure of civil rights, so the law in compassion has swerved somewhat from the strictness of justice on the one hand, in order to compensate the injustice done on the other. At least, this seems the most rational account of the practice. But if this be so, it is bad legislation: for every rational being is also a responsible being, nor is society likely to be benefited by relieving at least one-third of its members from the weight of criminal responsibility in a variety of cases: the wise legislator should rather go at once to the root of the evil, and deny to any human being such a legal power over another as may compel to the commission of crime, otherwise the law gives to every man who wishes to commit wrong an accomplice who is likely soon to be rendered unscrupulous by impunity. This thought probably crossed the minds of those who made the exception with regard to murder and treason, for here irresponsible accomplices were too dangerous to be permitted, and the woman is made responsible, notwithstanding the power which the law gives the husband of making her life miserable in case of non-compliance. The root of the evil in this case lies partly in the civil law, which deprives the woman, and especially the *feme covert*, of many of the rights of a citizen;* but the power of personal violence and abridgment of liberty, which the criminal law tacitly affords to the husband, by refusing to notice such offences of his against the wife, except on very outrageous occasions, must also bear its share of the blame: and it is much to be wished that unless absolute

wife under the guardianship of the husband, and entitles him for the sake of both to protect her from the danger of unrestrained intercourse with the world by enforcing," &c.

* The laws regarding property chiefly had their origin in feudal times, when the woman, being unable to do military service, was of course deprived of the privileges which such service obtained. On what principle of *right doing* the disabilities which that state of society rendered proper are continued, when feudal service is at an end, I leave to those who make and amend laws to consider.

duress be proved, the wife, no less than the husband, should be held responsible for criminal acts, and that in order to this even-handedness of justice, the woman should have the full rights of a free citizen afforded her—should be subject to no imprisonment but for crimes proved in open court, and to no personal violence farther than the enforcement of the sentence of such court should require. It will remain for those who treat of civil law to consider whether on their side also some amendment of the system be not required in order to restore this large portion of responsible moral agents to a position wherein they may be enabled to act up to the requirements of both the moral and social law. The state of society is not likely to be amended by granting impunity for crime as a compensation for denial of rights; thus affording to a large portion of its members freedom to do evil, while abridging very considerably their freedom to do good.

The second point on which I would observe, is one in which our criminal law is so at variance with that written on man's heart, that it would be well were it expunged from our future code. At present those who conceal offenders from the pursuit of justice are made liable to heavy penalties. As usual where human law is at variance with Divine, it is disregarded: the ties of kindred or of affection are too much interwoven in our very nature, and are formed of materials far too strong to be torn asunder by a mere cowardly fear. The friend who knows that by sheltering one who, however he may have transgressed, he still loves—he may expose himself to danger, gains merit in his own eyes, and those of others, by braving the consequences of an act which, though forbidden by law, is in accordance with the best feelings of the human heart: and whatever is felt to be an act of courage and fidelity will be done by brave and good men;—men who would have shrunk from committing the crime the perpetrator of which they have sheltered. Doubtless accomplices and persons deeply engaged in the same kind of nefarious practices may also afford shelter to criminals for their own private ends: but it is no less certain that the offence, if it be one, of sheltering a criminal from justice, is more likely to be committed by the generous and the

warm-hearted than by the calculating thief or accomplice. Suppose a case in which a man had been guilty of treason,—or, were those laws abolished,—of an unsuccessful attempt to overthrow the government, in which murder had been committed by shooting some of the soldiery. The friends of the offender know that though misguided, perhaps, he was not depraved—they are anxious to save him—a sister, it may be, hazards everything to accomplish the point,—she fails—is tried—convicted—and becomes liable to transportation for seven years! Probably the general feeling would be such that no sentence of this kind would be executed, but we ought not to leave in the statute-book an enactment which outrages man's best feelings, and is, mainly from that cause, useless in itself. When an enactment does not effect its purpose it ought to be repealed at once; for it is not well to habituate the people to disregard the law: and though this latter can never possess or expect to obtain that deference which we bestow on the higher laws of that Great Legislator who views the heart rather than the actions, yet it is well to keep it so in accordance with that which he has sanctioned, that it may borrow from it a claim to reverence which it has not in itself.

Having now gone cursorily over our criminal code, and so far examined it as to show wherein it is not in accordance with the principles laid down at the beginning of this treatise: it remains that we go on to the second head, and consider of the possible amendment of it by a fresh classification of crimes and penalties.

CHAPTER III.

POSSIBLE AMENDMENT OF THE PRESENT SYSTEM.

THE first step towards the consideration of a new system of penalties for crime which may be effectual toward its repression, must be an endeavor to become acquainted with the nature of the kind of persons upon whom the punishment is expected to operate: and for this purpose it is necessary to divide offences into such various classes as to make the very crime committed in some measure an indication of the character of the offender. To do so with complete accuracy would indeed be impossible; but the following divisions, which nearly coincide with those used in the published "Tables of Criminal Offenders," presented every year to the two Houses of Parliament, may serve the purpose.

1. Offences against property not committed with violence.

2. Offences against property committed with violence.

3. Forgery.

4. Offences against the person.

5. Malicious injuries to property.

6. Other offences not included in the above classes, such as riots, destroying game by night, &c.

SECTION I.

1. *Offences against property not committed with violence.*

In this first class is included the great bulk of the crime which is committed in this country. It embraces cattle stealing; horse stealing; sheep stealing; the various kinds of larceny; embezzlement; receiving stolen goods; frauds; and attempts to defraud. The first essay of the young criminal is made in some one of these offences. A girl giving way to the temptations thrown in her way

in the service of her mistress, or stealing a ribbon from a shop to gratify her vanity, becomes liable to the penalty of the law; or an ignorant laborer yields to a sudden temptation, and who for the first time steals and kills a sheep, is detected, and a severe punishment awaits him. These are instances which fall under one subdivision of this class.

In another subdivision is to be found the receiver of stolen goods, who, during many years, has been deriving a profit from his nefarious occupation, corrupting all those with whom he has brought himself in contact, and whilst he has seen victim after victim punished for the offences to which he has urged them on, and of which he has received the gain, has by his skill and talent eluded the law so as to escape detection, until his whole nature has become utterly corrupted and depraved.

Some of the fraudulent pretences which are made use of to obtain goods or money likewise indicate a mind which has been long addicted to the commission of crime. An instance of this kind occurred during the present year. The prisoner, a man of about forty years of age, a stranger to the townspeople, walked into a pawnbroker's shop, and sought to pledge a ring, which he said was of gold, and had been sent him by his son who was in India. The ring was tried with aqua fortis, and withstood the test, and twenty shillings were thereupon advanced. The same tale imposed upon other pawnbrokers in the town, from whom the prisoner thus obtained money to the amount of five or six pounds. In the meantime, one shopman, more anxious than the rest, applied a file to the supposed gold, and found to his dismay another metal. All the rings turned out to be made of zinc, and had been covered with gold by the electric process now well known, and the man who had thus disposed of them was shortly afterwards apprehended in the act of disposing of a large cross of a similar kind, which he said had been the property of a deceased Roman Catholic lady. He was convicted of obtaining money under false pretences, and sentenced to seven years' transportation. The conduct of this man throughout, together with the very nature of the offence, evinced a character of selfish cunning.

So, again, there may be found persons leagued together in sheep-stealing or horse-stealing, whose plans are all concerted in the first instance to commit the theft, and afterwards dispose of the produce;—gangs of offenders who live by crime.

These four subdivisions, which depend mainly on the character of the offender existing in all the offences enumerated under this division, it is clear that legislators can do no more at present, than affix various degrees and kinds of punishment, leaving it to the discretion of the judge to determine its application in each particular case. Let us proceed by steps.

In the first place we find a numerous body of poor neglected children, who are known to the legislature as "juvenile offenders:"—a term that has become familiar to the ears of all from the attempts that have been made at different times to arrive at some kind of efficient punishment for them, which might reform whilst it chastised. Of all the problems of criminal legislation this is the most difficult to solve, but at the same time if grappled with successfully, that from which the largest benefit may be expected, since then the most fruitful source of heavier crime is at once dried up. In this class I would include all offenders under sixteen years of age.

Cases sometimes occur when from mere wantonness boys commit small thefts; for them a whipping is perhaps the best punishment, for there the mind is not corrupt, and if surrounding circumstances do not induce them again to err in like manner, the remembrance of the pain and disgrace they have suffered will prevent a repetition of the offence by themselves or others similarly situated.

But those who for the first time fall within the category of juvenile offenders are, for the most part, children who have had an evil example set them by their parents, or have been allowed to mix with bad companions, or have been deliberately tutored into crime. The effect of imprisonment in such cases has been already adverted to, and its utter failure as a preventive of crime, and a step towards reformation has been sufficiently pointed out. This has not been overlooked by the administrators of the law, and in courts of justice, when the judge looks with

a compassionate eye upon the youth and neglected education of the criminal, he is not unfrequently heard to pronounce sentence of transportation upon him as a matter of kindness, accompanying the sentence with the expression of his determination to write to the Secretary of State requesting that he may be sent to Parkhurst.* It sometimes happens that Parkhurst is full and the boy is

* Parkhurst prison was established by the statute 1 and 2 Vict. c. 82, which, after reciting that "it may be of great public advantage that a prison be provided in which young offenders may be detained and corrected and may receive such instruction and be subject to such discipline as shall appear most conducive to their reformation, and to the repression of crime, and that the buildings at Parkhurst in the Isle of Wight lately used as a military hospital, and as a military asylum for the children of soldiers, are buildings which may be conveniently used for such a prison," provides, "that it shall be lawful for her majesty by warrant under the royal sign manual to appoint that the said buildings at Parkhurst shall be used as a prison for the confinement of such offenders as are hereinafter mentioned, as soon as the same can be fitted and completed for that purpose." Under this statute power is given to the Secretary of State for the Home Department to direct the removal to Parkhurst of those who are under sentence of transportation, and those under sentence of imprisonment, to continue there until transported, or they shall become entitled to liberty, or until they shall be removed back to the prison whence they were taken. Instances of the exercise of this power with respect to the latter class, have been exceedingly few in number; and by far the greater number of the prisoners at Parkhurst have been allowed to avail themselves of her majesty's pardon, conditional on their emigrating to the colonies of Western Australia, New Zealand, or Van Diemen's Land. Parkhurst was adapted for the reception of prisoners on the 26th of December, 1838; and the first report of the visitors appointed under the above statute, was presented to the Secretary of State on the 1st of July, 1839. From that report it appears that the prison can accommodate 320 persons; 200 prisoners in the upper wards, and 120 in the junior ward. They are employed in agricultural labor, in learning trades, in performing domestic offices, and in school lessons. The workshops are within the prison walls; outside are nearly eighty acres of land, for employing the prisoners in agricultural labor.

Vide st. 1 and 2 Vict., ch. 82, and the reports of visitors, 1839-1844.

therefore at once transported, but the sentence and the recommendation show the estimate which is made by many of our judges, of the relative value of the two systems of punishment. It is at once a recognition of the evil of imprisonment, and of the good arising to the criminal by being removed from all circumstances which have led to the commission of his crime.

I would propose, therefore, as a second degree of punishment, deportation from England to a colony, say Canada, where, in asylums properly constituted for that purpose, they might receive education, be taught trades, and after a time of probation had elapsed, and by their labor they had contributed towards defraying the expense of their maintenance and teaching,—might be allowed in that same colony to live free men, supported by their own exertions. If there were a market for labor there at all, they would find their early fault no obstacle to their employment, for the training they had gone through would more than counterbalance in the mind of the employer the cause of their coming to the colony:—i. e., a *first* offence, committed in early youth. An asylum of the kind proposed in a colony, has a considerable advantage over any in England, however well conducted: for at the period of discharge employment might immediately be obtained in a freshly settled country; since where there are new lands to be cleared, a laborer can never be at a loss for work, and a boy trained in the country, accustomed to the climate, and to the kind of labor which he would be engaged in, would, as a man be a much more valuable servant than an emigrant that has all to learn, and is probably discontented with his situation, and perhaps suffering from change of climate. Even if the boys of an establishment of this kind in England were afterwards sent to the colonies as laborers, by way of removing them from the temptation to crime which our dense population always presents, they would be comparatively helpless and useless, unaccustomed to exercise their talents in the contrivances and expedients which, if they had been from the first engaged a part of the day in the agricultural labor of the colony, would, before the period of their discharge, have become familiar to them.

The effects of such a system even upon boys who have been transported for a second or third offence, and exposed to the corrupting influence of the hulks, is well exemplified in the case of the Penitentiary established at Point Puer in Norfolk Island. This was instituted in 1834. In its early establishment the value of six months' labor of 200 boys amounted to £1134, and this, taking their clothing and maintenance at £25 each, per ann. is very nearly half the cost: for $200 \times 25 = 5000$, and half this sum gives £2500 for the six months. But £25 is perhaps rather a high average, for the cost of each pauper in an Union Workhouse is considerably lower. The convict upon his arrival is allowed to make choice out of six occupations, viz., that of a carpenter, sawyer, nailer, shoemaker, tailor, and agricultural labor. They rise at five, and after attending prayers are marched off in military order to agricultural employments till half past eight, when they return to breakfast. At half-past nine the boys proceed to their different trades; at one they dine, and resume their work from two to five; between five and six they sup; from six to eight a school is opened under the direction of a schoolmaster, and after prayers the boys retire to bed. They sleep in hammocks. They are allowed three hearty meals per diem; they cultivate the ground upon which the vegetables they use are grown, and although the buildings were erected under the superintendence of the government, all the labor was done by the boys, with the exception of a part of the barracks. The good effects of the system were soon experienced; and of 39 boys who were removed to this establishment upon their arrival in the colony in May, 1834, the greater part of whom were afterwards forwarded to Hobart Town for assignment, 20 were never tried subsequently; seven or eight others but once or twice; whilst, on the other hand, many of the boys on the former system during a similar period had committed nineteen or twenty offences calling for magisterial interference.*

But whilst the actual condition of the convict would be

* Report of the Committee of the House of Lords on Transportation. Ditto upon Jails, 1835.

greatly improved, as compared with what it would have been had he remained in this country, the penalty would be one which would effectually deter from crime. In youth a compulsory removal from a place which we are accustomed to and know thoroughly, to one which is wholly unknown, is always looked upon with much dread. Few of us forget throughout life, the first journey from home to school. It required the kindest words of encouragement from our parents to soften the blow, and the separation was only acquiesced in by the child because he was conscious that it was for his good, and that the absence from home would be of short duration. Hold out removal from this country as a punishment, with nothing to soften the pang of separation from all the associations of childhood, with no one near, just escaped from prison himself to tell tales of its comparative comfort, and it would be difficult to invent any penalty to all appearance more frightful. To this it may be added, that there would be small inducement to train a child to theft, as many are now trained, if his instructor in crime were fully aware that the first detected offence would place him for ever beyond the reach of his influence:

By thus removing a criminal in the first stage of his career, who, if allowed to remain in England, would, with the fillip which imprisonment too often gives, gradually increase in the gravity and daringness of his crimes, as increased experience added skill to his plans of depredation, there would no longer remain the means of recruiting the ranks of the more desperate offenders. Experience of courts of justice and official documents tell us that against such persons previous convictions for felony are constantly produced in evidence, the consequence of which almost invariably is a sentence of transportation.* Then it is that boys are sent to Parkhurst, and adults to

* By statute 7 and 8 Geo. IV. c. 28, sec. 11. If any person shall be convicted of any felony not punishable with death, committed after a previous conviction for felony; such persons shall on such subsequent conviction be liable at the direction of the court to be transported beyond the seas for life, or for any term not less than seven years; or to be imprisoned for any term, &c.

Pentonville prison, there to receive instruction and to be subjected to a moral discipline which may ultimately redeem them from their state of degradation.

In the report of Parkhurst prison for 1844, it appears that 139 boys who had left it during the preceding year were disposed of in the following manner:—

Removed for transportation	23
Sent to the refuge for the destitute	1
Released with a free pardon	2
Restored to their friends on the expiration of their sentence of imprisonment	3
Apprentices sent to W. Australia with conditional pardon	28*
Ditto to Van Diemen's Land	21
Emigrants to Van Diemen's Land	11
Sent to Van Diemen's Land to receive proba- tionary passes there	19
Emigrants to New Zealand	22
Apprentices to ditto	9

139

Out of these, seventeen are stated to be incorrigible. What a tale of previous corruption does that word tell of! But if the means at hand at Parkhurst or any other similarly well-arranged penitentiary were used when the child was first led into the commission of crimes instead of being postponed until he had become a hardened criminal, who can doubt but that the work of moral reformation would have been much more rapid and certain than it is at present. As it is they are sent to Van Diemen's Land as convicts, in many cases to lead a career of infamy for the term for which they may have been transported, and eventually to return to this country utterly reckless and abandoned. Yet if in 120 cases success more or less attended the efforts of the teachers where the work of corruption had already gone on for a considerable time, how much more success might we expect when those efforts were directed to the improvement of natures very slightly deteriorated. Experience has taught us what might well have been predicated, that juvenile offenders

are a class easily to be reformed, and that the instances where the attempt has failed are those in which the frequent commission of offences has entirely destroyed the moral feeling. It may with safety be laid down that if for a first offence removal from this country to a penitentiary abroad were to take place, no report would affix the word "incurrible" to any of its inmates.

There is another subject connected with the punishment of juvenile offenders which requires an observation. The immediate application of the means of reformation which I have insisted on would be interfered with to a great extent, if boys in the interval between their apprehension and trial were to be exposed to the contaminating influence of a prison; for at present it is notorious that often before trial the youthful prisoner has been allowed to be taught the lessons of crime by others more experienced than himself.*

It is obvious, however, that in proportion as you diminish the number of cases punishable by imprisonment, you afford the means of a better system of classification of untried offenders while in confinement, and will be better enabled to carry into effect regulations for the purpose of separating them from the more depraved. With a view to avoiding the contamination to be apprehended for the juvenile offender in the intercourse of a jail, Sir Eardly Wilmot brought a Bill into the House of Commons in 1833, which had for its object the introduction of a summary trial before two justices, so as to avoid the imprisonment before conviction. In asking for leave to introduce this bill he stated that in the county which he

* An instance of the evil resulting from the insufficient classification of prisoners occurred at the last assizes. A boy imprisoned for a very trifling offence was allowed to hold intercourse with others in the prison. A prisoner much older than himself, but whose term of imprisonment expired at the same time, induced him shortly afterwards to join with him in uttering counterfeit coin. Fortunately the boy was detected upon the first attempt, and admitted as evidence against his accomplice. He told his story most artlessly, and his testimony being confirmed by other witnesses, his corrupter was convicted. So destitute was this poor boy, that the night of his discharge was passed in the station house.

represented (Derbyshire) considerably more than half the criminal offenders were under twenty-one years of age, and during the last seven years 1300 individuals had been tried who were under eighteen, and of these one-half were under fifteen. Thus boys being sent to jail for they hardly knew what, soon became corrupted or depraved, their sense of shame was destroyed, and they were converted into hardened offenders. The bill was dropped, but I should feel much inclined to adopt its provisions so far as to entrust justices with the power of summary conviction in all cases where the criminal was under sixteen years of age, unless he or his father or his mother or nearest relation should require trial by jury, when the child should be removed to prison to take his trial with others.

One other inquiry remains,—i. e., the cost of the proposed system of deportation. In its first operation an increase of expense would be perceivable, but not to any alarming extent; for it has already been shown that a penitentiary in a country where labor is valuable, and the means of sustenance plentiful, soon realizes a considerable sum from the work of its inmates. But if, as it is most confidently anticipated, the effect of the system would be to lessen the number of criminals in this country, then the saving of expenditure which would arise from this diminution of the number of offenders would more than counterbalance any increase on the other side. So far, at any rate, as “juvenile offenders” go, the increase of expense should not prevent the plan proposed from being tried, if in other respects it is good. If a society, by its lack of care and foresight, allow any of its young population to be in such a state that the wonder is rather that crime is abstained from, than that it is committed, the least which that society can do,—if it demand a penalty for the infraction of its laws,—is to take care that the punished child is placed in a situation which allows him the opportunity of becoming eventually a good man. If England have a conscience, she ought not to be satisfied with less.

We next approach those cases in which, although the criminal be an adult, the circumstances attending the

commission of the offence, the absence of any previous conviction, and the general good character, all betoken a nature but little hardened. Imprisonment has been shown to fail in these cases as in those of juvenile offenders. Deportation to penitentiaries abroad, framed upon the model of the Pentonville prison, but with considerable alteration in many of its particulars, of the discipline which is necessary to be maintained there, is what I venture to recommend in its stead.

On the cell of each prisoner at Pentonville is affixed the following notice:—

“Prisoners admitted into the Pentonville Prison will have an opportunity of being taught a trade, and of receiving sound moral and religious instruction. They will be transplanted to a penal colony in classes, as follows:

“FIRST CLASS.

“Prisoners who shall, when sent from this prison, be reported by the governor and chaplain to have behaved well.

“These at the end of eighteen months will be sent to Van Diemen’s Land, to receive a ticket of leave on landing, which, until forfeited by bad conduct, will in that country confer most of the advantages of freedom. Labor being in great demand, and wages therefore high, the prisoner’s knowledge of a trade will enable him, with industry and continued good conduct, to secure a comfortable and respectable position in society. Prisoners who obtain tickets of leave may also, by industry and good conduct, acquire in a short time means sufficient to enable their families to follow them.

“SECOND CLASS.

“Prisoners who have not behaved well.

“These, also, at the end of eighteen months, will be transported to Van Diemen’s Land, where they will receive a probationary pass, which will secure to them only a limited portion of their earnings, will admit of their enjoying only a small portion of liberty, and will subject them to many restraints and privations.

"THIRD CLASS.

"Prisoners who have behaved ill.

"These will be transported to Tasman's Peninsula, a small colony occupied only by convicts and a military guard, there to be employed in public works in probationary gangs, without wages and deprived of liberty; and their families will not under any circumstances be allowed to follow them. Prisoners will see how much depends upon their own conduct during their confinement in this prison. According to their behavior and improvement here, will be their future position in the colony to which they will be sent."

Such are the words of kindness and consolation which meet the eye of the convict when he is first introduced into this asylum: or his first lessons in reading tell the good in store for him if he behave well. He has the hope of becoming something better; and the means of knowledge and moral reformation are at hand. At Pentonville these have been used successfully. Of 500 men upon whom the treatment has been tried, only five or six have been pronounced incorrigible: and yet among their ranks are many convicted of the most serious offences, and whose previous lives had been one continued series of crime. Eighteen months of preparation are scarcely too long for such as these, and entire separation from all intercourse with each other is necessary. There are evils, however, attendant upon all systems of solitary confinement, which have been already noticed; and no one would seek to impose it except as a lesser evil, by which the greater one of the communication of depraved thought is prevented.

In the case of less hardened offenders many alleviations of this system might be allowed. The sentence, in order to distinguish it from the penalty of "transportation," as now in use, should be "*compulsory emigration for life*," and the condition of the prisoner should be assimilated to that of the emigrant directly he is rendered fit, and is capable of maintaining himself. For this purpose so soon as he has received from the governor of the prison a certificate of proficiency in the trade or occupation he has

selected, and one of good moral character from the chaplain, a pardon conditional on his not quitting the colony should be granted. These certificates would be ready passports for employment, and instead of being regarded as memorials of former shame, they would be treasured as precious tokens of an improved condition of life. I would propose further, that upon copies of these certificates being sent to the officers of the parish where the emigrant had gained a settlement, it should be compulsory upon them, on the application of the wife, to send out to the colony both her and her children. This would cure many evils: it would be but right as respects the man who has been subjected to a punishment severe in the first instance, and which, without the hope of this alleviation, would be too severe; and to the unoffending wife and children, who have been deprived by the law of their natural protector, it would be only common justice to hold out to them the means of rejoining him: the state of the colony and of the mother country would both be benefited; the parish which would otherwise be burdened with the support of them for years as paupers, would not be prejudiced; and the scandal which now so often occurs from the contraction of a second marriage during the life of the first husband or the living in adultery—transgressions into which the woman is often almost driven by her destitute condition—would be avoided. Let the wife rejoin her husband, the children their father, and in a country where labor will win a sufficient remuneration, and temptation to crime is thereby diminished, they would form an honest, well-conducted emigrant family.

With regard to female offenders, a similar system might well be pursued. Hitherto the plan of transportation as respects them, has utterly failed. The evidence given before the transportation committee respecting female convicts was truly disheartening; but it must be recollected that they had lost all sense of shame before they left England, and it could hardly be expected that they would conduct themselves better when assigned as servants in New South Wales, or taken to the factory at Paramatta, where but little discipline was maintained.

Let them, however, be removed from this country for a first offence, placed in penitentiaries abroad,—taught occupations which would qualify them to discharge efficiently the duties of an emigrant's wife, or of a good household servant upon their leaving the penitentiary,—granted certificates of acquirement and of moral character, and there would be no reason to doubt that the objects of criminal punishment would be attained, with regard to female offenders both juvenile and adult, as completely as has already been anticipated in the case of boys and men, and partly proved by the experience of Parkhurst, Point Puer, and Pentonville. The general rule is a clear one:—effectually punish crime in its first outbreak;—delay can only produce a necessity for severer measures,—increased expense to society, greater pain to the offender, and render after all the success, both in deterring from crime and in reforming the criminal, less certain.

We have thus disposed of the cases in the first subdivision of the offences against property considered not upon the ground of the loss which society may have sustained by the perpetration of the offence, but with a view to the kind of human creature who committed it. The second subdivision is more easily disposed of. This, as has already been stated, consists of men who, either by the fault of the present system, or from an insufficient detective police force, have grown gray in guilt. The first of these causes, it is to be hoped, will be ultimately removed; but for many years, the numbers of this class will necessarily be considerable. I am unable to suggest any plan better adapted to the reform of these offenders than that of transportation under Lord Stanley's orders; cases from among them being selected as at present for the preparatory discipline of Pentonville. The ability displayed by such offenders, while it leaves them less excuse for their crime, renders a severe punishment needful to prevent them from repeating it. With them the profit arising from their criminal course is calculated to a nicety, and against it are set off the chances of detection, and the fear of punishment. They have employed their talents against society, and they cannot complain of being removed to another country where they will have less opportunity of exercis-

ing their bad ingenuity in defrauding their neighbors, and where, though they must pass a life of hardship at first, they have the hope allowed them of ameliorating their condition by an improvement in conduct. They would thus go through the grades of

1. Detention in Norfolk island.
2. Probation gangs.
3. Probation passes, by virtue of which they become for the first time entitled to a portion of their wages.
4. Ticket of leave, which has all the effect of a pardon, except that they are restricted to the colony.
5. Pardon.

Even in these cases, when a convict had obtained to the fourth class, it would be desirable that his wife and children should be sent out to him at the mutual request of both parties.

The same order of Lord Stanley contains efficient instructions relative to the treatment of female convicts who would be in this subdivision.*

SECTION II.

2. *Offences against property committed with violence.*

This class includes the various kinds of burglary; housebreaking; robbery; sending threatening letters to extort money, &c. The total number of offenders sentenced in the year 1843, in the county of York† for crimes included under this head, was 237: that of criminals of the first class 1246; so that we may reckon offenders of the second description at about one-fifth of the number of those of the first. First offenders are found but rarely among their ranks, although sometimes it hap-

* Vide Order in Appendix.

† Vide the tables of criminal offenders presented to both Houses of Parliament for 1844, page 40. I have selected the table of criminal offenders for the county of York, by way of showing the comparative number in each class, as from its large manufacturing and agricultural population it affords a fair criterion for the whole of England.

pens that a prisoner is presumed to be so from not having been before detected.

In all these cases I would leave the system of transportation upon a scale proportioned to the magnitude of the offence as it is at present. Much might indeed be said against the policy of allowing the return of a convict to his former associates in the mother country, even after any period of expatriation; but it is difficult to suggest degrees of transportation which would be understood at home, excepting those of duration of time: and a bad man is sometimes deterred from committing violence in addition to the robbery by the remembrance that in that case his offence, if detected, would be more severely visited. In all the offences of this class, however, the judge should be allowed to substitute "Compulsory Emigration" for transportation, where sufficient mitigating circumstances exist to justify the change.

SECTION III.

3. *Forgery and offences against the Currency.*

The observations already made on offenders who make use of their talents to defraud their fellow-men, apply to this class also. Forgery is never attempted by an uneducated man. If his knowledge of the law has served to preserve him from the penalties of its actual infraction before, it has not been from the lack of will to make a profit at the expense of society; but from a fear of the attendant punishment. He has previously done many a dishonest act, and the desire of profiting still more largely, has at last banished all thought of prudence from his mind, and he breaks the law. His nature had been corrupted long before.

Transportation is a fit punishment for such an individual, as also for the practised coiner: but this latter has frequently accomplices, more particularly in the offence of uttering counterfeit coin, whose character is of a very different description—foolish victims of the clever principals. Compulsory Emigration would deter and yet improve such persons. They are generally idle characters, who if they once learn that money can be gained more easily

by crime than by labor, are easily tempted to the commission of a first offence; but who, if not removed from the country, would pursue their vicious course farther, until they were at last detected in the commission of a great crime. Imprisonment is worse than useless in such cases.

SECTION IV.

4. *Offences against the person.*
5. *Malicious offences against property.*

We now enter upon a second great division of crime. The fourth class consists of murder; manslaughter; rape; abduction and assaults against the person, of various degrees of enormity. In number these again show a decrease from those we have last considered. The convictions in 1843, in the county of York, amounted only to 87 cases, many of these being assaults of a comparatively trivial nature, for which but a short period of imprisonment was inflicted.

The fifth class includes the various kinds of arson; destroying machinery; killing and maiming cattle; and other malicious offences against property of a like kind. Of these the convictions in the same county and year amounted to only 11.

I have been induced to consider these two classes together, since although differing very much in degree, they are in many instances the same in character. In revenge I seek to do my neighbor an injury; if a stronger man I assault him; if weaker I injure his property; but whichever of these alternatives be taken, the criminal is a very different person from those we have formerly treated of. The animus which urges to the committal of larceny or robbery is personal advantage,—the animus in the other is the delight of occasioning a loss of life, or limb, or property to the individual injured. A thief is led into crime by the hope of gain, but would gladly receive the amount in pounds sterling, without having to undergo the labor attending the commission of the crime added to the chance of punishment upon detection;—the offender

against the person or the malicious injurer of property would often put himself into considerable personal peril, and sustain great pecuniary loss for the sake of obtaining his desired revenge.

With respect to the punishment now in force for the greater crimes of the fourth class, I have no observation to make. The question of the expediency of capital punishment in any case, has been so largely discussed, that it would be unnecessary to argue it here, nor would so small a treatise allow space for it. In practice there is seldom an execution in this country for any other crime than that of murder, and at present at least, no one has been able to devise any effectual substitute for capital punishment in this case. In others, where this awful sentence is recorded, it is generally commuted for transportation for life, and by a recent statute the same punishment may now by law be inflicted in many cases which used to be capital.

In determining on an adequate punishment for these offences, the difficulties are, that on the one hand it must be so severe as to deter a man from its commission, even when under the influence of excited passion; on the other, it ought in its nature to be such as to lead to an amendment, if possible, in the temperament of the offender. Short of death, transportation for life is, in its consequences, the most dreadful punishment; and the power of inflicting it must still be left with the judge, never to be inflicted in these cases unless the most urgent necessity demands it. Success may possibly attend the new orders of Lord Stanley; but hitherto every official document from Norfolk Island shows that by removing men of this description to a place where public opinion exercises no control, and where hardship and suffering irritate the mind, fuller sway is given to their before ill-governed passions and appetites. Again to repeat those dreadful words before quoted, "when a man comes to this island he loses the heart of a man, and gets the heart of a beast." Upon criminals, such as these the hope of worldly prosperity is not likely to operate:—unaccustomed to self-control, on the first opportunity they will again seek the gratification of their passions—again plunge into crime—encounter

re-transportation as the penalty,—become wild ferocious animals in the hopelessness of Norfolk Island, and having become worse instead of better in consequence of the penalties inflicted by social law, will at last finish by meriting and suffering capital punishment: a consummation, as it appears from official documents, not unfrequently *sought* by the wretched convict.

But how will such a criminal best be reformed? He is not in general a calculator; self-interest will therefore have little influence upon him, and the prospect of raising himself in the world would not counterbalance long habits of vice, and ungoverned passion. The removing him to another country where the standard of civilization is lower than in this, although the means of employment may be greater, would be hurtful rather than beneficial in this case: but a separation from the world, in some place where the mind of the prisoner could be educated, moral discipline enforced, religious instruction afforded, and medical superintendence bestowed, might probably be successful after a time. When a man's passions can no longer be controlled by his reason, the first step has been taken towards insanity, and if their outbreak be such as to lead him to infringe the law, he should be treated as laboring under incipient disease of this kind. It is not by this intended that there should be an acquittal on the ground of insanity, but such criminals should upon conviction be removed to prison, there to remain for not less than twelve months, and longer until her majesty be pleased to release them, which should be on a certificate of confirmed good conduct from the visiting justices, on the testimony of the chaplain and governor. Their numbers have been shown to be small, the expense therefore would not be great: the prisons as they now exist would suffice, for the crowds of offenders which at present fill them would be otherwise disposed of: and upon their release from prison after so long a discipline it is not likely that they would repeat crimes against which the feeling of society is strong,—which a watchful police renders hazardous,—and which it is to be hoped, their own better regulated nature would recoil from.

But this kind of punishment would be inapplicable to

individuals who from ill-reasoning on one point, though perhaps their general character may not have been bad, have been induced to destroy property. They are destroyers of barns and machinery, but their nature has not perhaps been corrupted by any great moral depravity: frequently we have proof to the contrary on the trial: but they have thought that they were carrying out a great principle of good for their class, and in order to enunciate it, they have thought themselves obliged—herein following the example of many politicians of a higher grade—to occasion a lesser evil. It is impossible under any other hypothesis to explain the fact, of the entire absence of personal enmity against the farmer injured, shown in the fire cases in Suffolk lately, in the destruction of machinery in Lancashire last year, and in Kent in 1830. They are suffering great privations, they know no other means of awakening public attention to their wants, they therefore make this their voice, thinking perhaps that they are remedying at the same time some of their grievances by the means they have taken to make them known. Actual transportation is too severe a punishment for these men, excepting when the offence has been committed under aggravated circumstances; imprisonment in the mode above suggested would fail, for by a conviction for a crime of this nature such a brand is fixed on the brow of the offender that no farmer would afterwards employ him, and his lot in England would be wretched. Compulsory emigration for life is what I would propose as a penalty for crimes of this description.

For the lesser kinds of offence in this class which betoken the irregularity of youth rather than depravity of character, imprisonment with hard labor is the best punishment. It deters this species of offender; and if the numbers in the prisons are lessened, and the worst class of criminals removed, but little contamination, if any, could be apprehended, and the character of the prisoner at least would not be deteriorated.

SECTION V.

1. *Other offences not included in the above classes.*

These, with one exception,—perjury,—are of a nature to which the concluding remarks of the last section are applicable:—for perjury, transportation should be retained. The man who wilfully gives false testimony differs but little from him who uses a false plate or die. His punishment should be the same.

I have now reviewed all the offences of which our law takes cognizance. In many of the punishments alterations have been suggested, which are put forward in the belief that they will bear the two great tests which ought to be applied to all provisions of this nature, *i. e.*, that while they would lead to the prevention of crime, they would at the same time reform the criminal.

Hitherto, with very rare exceptions, no one has paid any attention to the general condition of offenders against the laws. Some great crime perhaps concentrates for a time a morbid interest upon the individual who has committed it, but this is the result of mere curiosity for the most part, which is soon exhausted, and no beneficial result ensues: the subject is in itself a distasteful one; no man likes to contemplate the degradation of his species, and the malefactor is, by general consent, put out of remembrance. It is only thus that the system of wholesale transportation, with all its moral evils, could have gone on so long without an attempt at any amendment: year after year thousands of wretches were removed from England to perpetrate the same or worse crimes elsewhere, and the public was satisfied. The Archbishop of Dublin at last laid open its horrors before the lords, many of whom acknowledged that they were unaware till then of what had been the state of things, and to his efforts must be attributed the present improvement in the system. To a certain degree, therefore, he has been successful, but more, much more, remains to be done.

It is not enough that the wealthy classes, like the Pharisee of old, self-satisfied in their abstinence from a

certain set of crimes, in their compliance with the usages of society, and in their general intelligence, "thank God that they are not as so many other men are," and suppose that there is nothing to amend in a state of society which yearly condemns thousands to suffer the penalty of crimes to which that very state of society has tempted them, and against which it has provided no safeguard. Wealth and power were not given either to enable the possessors to enjoy in greater abundance the pleasures of sense, or even to sit down in quiet comfort, well pleased with themselves that they have no temptation to do evil. Riches and greatness are the talents which the lord who went on a far journey confided to his servants, to be used so as to bring him at his coming an ample return. Let the landlord at that day be able to greet his greater master with "Lord, thou gavest me abundance, and lo! I have used it to enlarge thy kingdom; here are the tenants and the laborers whom I have lived among and instructed, as well by kind words as example—they are good Christians and happy men—let them be my companions for eternity!" Let the princely merchant and wealthy manufacturer be able to reply, "Lord, I had not extensive estates confided to me, but I have had numerous dependents. I have forborne to enrich myself as much as I might have done, in order to afford to these people the instruction and the comforts without which man sinks into the brute. Here are my work people, my porters, my clerks—thy talent has gained ten!" Were such the rule instead of the exception, we should not need to build jails and workhouses. But this happy state of things cannot be expected yet, even if all were as much alive to the duties of their high station as, I thank God, many are;—for changes in society go on slowly. In the mean time it only remains that legislators do their duty too; and when they find a poor wretch steeped to the lips in misery and guilt, let them look with compassion upon him, however low he may be fallen; and for His sake in whose IMAGE he was made, endeavor to rescue him from degradation and sin, and restore the lost prodigal to his Father and theirs.

APPENDIX.

Convict Discipline. Ordered by the House of Commons to be printed, 3 April, 1843.

COPY of a DISPATCH from Lord Stanley to Lieutenant-Governor Sir John Franklin.

Downing-street, 25 November, 1842.

SIR,

I AVAIL myself of the departure from this country of the newly appointed secretary at Van Diemen's land, as the most convenient opportunity I could find for conveying to you those instructions on the subject of convict discipline, which you will for some time past have been expecting to receive. The delay which has occurred in settling a question at once so arduous and so important, has been inevitable; and even yet it is not in my power to announce the completion of the measures requisite for enabling you to carry into effect the views of the ministers of the crown. But I do not regret a postponement which has enabled me and my colleagues carefully to examine the ground we propose to occupy, aided by all the information to be drawn from the Report of the recent Committee of the House of Commons, and from the evidence on which that report proceeded; and from other channels of intelligence which have been opened to us since the close of the labors of that committee.

In proceeding to signify to you the conclusions to which Her Majesty's Government have been led by this course of inquiry, I propose to sacrifice to perspicuity every object which would interfere with it; and to that end I will state at the outset what are the topics to which I propose to address myself, and what is the order in which I am about to notice them.

First, then, I will endeavor to state what are the general principles by which Her Majesty's Government will be guided in the management of the convict population in the penal colonies.

Secondly, I will consider, in their order, each of the five stages through which a convict will have to pass from the commencement of his sentence until he shall attain (as often as it may be attainable) a pardon either absolute or conditional.

Thirdly, I will indicate what are the legal instruments to be completed, and what the official appointments and arrangements to be made before those general principles can be carried entirely into effect; and those specific rules fully executed. Hence you will readily collect to what extent this dispatch can be taken as an instruction for your immediate guidance, and how far it is to be understood as merely preparatory to the introduction of the new system of convict discipline.

Reverting to this distribution of the topics to be noticed, I shall first explain what are the general principles by which her Majesty's Government propose to be guided in the management of the convict population in the penal colonies.

You will readily anticipate that I am not about to enter into any abstract or speculative inquiries on the subject of the punishment of crime, or as to the particular form of punishment administered in our penal colonies. My object is merely to state some broad conclusions which it is necessary to premise, in order to render intelligible the objects of the more minute regulations which will follow. Her majesty's government, then, regard it as indispensable, that every convict transported, whether for a longer or a shorter period, should actually undergo that punishment without either pardon or mitigation for some predetermined period, bearing, in each case, a proportion to the length of the sentence. We further think that it should be reserved to the queen herself to make any exception from this rule; and that the royal prerogative of mercy should not be delegated to the governor of the colony in such terms as would enable him to relax it. We do not, however, contemplate a state of things in which the con-

vict, suffering under the sentence of the law, should ever be excluded from the hope of amending his condition by blameless or meritorious behavior, or from the fear of enhancing the hardships of it by misconduct. On the contrary, to keep alive an invigorating hope, and a salutary dread at every stage of the progress of the prisoner from the commencement to the close of his punishment, appears to us to be an indispensable part of the discipline to which he should be subjected. Further, we contemplate the necessity of subjecting every convict to successive stages of punishment, decreasing in rigor at each successive step until he reaches that ultimate stage in which he shall be capable of a pardon either absolute or conditional, though not ever entitled to demand that indulgence of right. It is, moreover, our opinion that the transition from one stage of punishment to another less severe should be withheld from any convict who, by misconduct, may have forfeited his claim to such mitigation. On the other hand, we think that a course of meritorious or blameless conduct in any one stage should entitle the convict in any future stage of punishment to such proportionate relaxations of the severity of his condition as may be compatible with his continuance in it; and that such good conduct should ultimately have a favorable effect whenever the question of granting a pardon may be ripe for decision. To these general principles it is to be added, that in the case of certain classes of convicts sentenced to transportation for not more than seven years, her majesty's government propose that the first stage of punishment should be undergone, not in the colony, but in a penitentiary in this country; and that the convicts should, at the expiration of a given time, be sent to the colony, there to enter on such stage of penal discipline as may in each particular case be indicated by the Secretary of State for the Home Department.

I should leave unnoticed the most important of all the general principles to which the ministers of the crown look, so far as respects the convict himself and the society in which he is to live, if I omitted to add that we anticipate from a systematic course of moral and religious instruction, which the congregation of the convicts in

masses will afford, the means of applying such salutary influences as may best qualify them for entering on the temptations of an independent course of life, and may induce them to betake themselves to industrious and useful pursuits.

Secondly, such being the general principles by which her majesty's government propose to be guided, I will next consider in their order, each of the five stages through which a convict will have to pass. For the sake of distinctness, they may be described as follows: 1. Detention at Norfolk Island. 2. The Probationary Gang. 3. The Probation Passes. 4. Tickets of Leave; and, 5. Pardons.

1st. Detention in Norfolk Island will be the invariable consequence of all sentences of transportation for life; and will also be applied to the more aggravated cases of convicts sentenced to any term not less than fifteen years. Four years will be the longest period, and two years the shortest period, for which any convict will be sentenced to detention at Norfolk Island. In each case the Secretary of State for the Home Department will, between these limits, indicate the length of time for which the convict is to be detained at that place. This statement is, however, applicable only to the cases of convicts transported direct from the United Kingdom. It will be left to the discretion of the Governors of New South Wales and of Van Diemen's Land respectively, to transport convicts under similar colonial sentences, either to Norfolk Island, or to the penal settlement of Port Arthur in Van Diemen's Land, of which the regulations and discipline will be nearly similar.

Arrived at Norfolk Island, the convict will be employed at hard labor. No authority except that of the queen herself will be competent to abridge the time of his detention there. On the other hand, the misconduct of the convict in Norfolk Island may have the effect of prolonging his detention there indefinitely, within the limits of the term of his original sentence.

But although even good conduct on the part of the convict cannot abridge the duration of this part of his sentence, yet any one who, by a course of blameless or meritorious

behavior at Norfolk Island, shall have established a claim to favorable consideration, will have the benefit of that claim in the future stages of his career.

To estimate at the end of four years, or even two years, the good or the bad conduct which a convict may have observed through so long a period, would hardly be practicable, unless some system were adopted of daily or weekly notation of the conduct, whether meritorious or culpable, of each. At this distance, I do not propose to enter on topics so minute as these; they are more fitly matter for local regulation. But whatever regulation may be made, should have for its object to leave as little as possible to general and indistinct recollection, and to make the attestation of good or of bad conduct as much as possible a matter of cotemporary record.

Before I pass from the subject of detention at Norfolk Island, it will be convenient that I should notice in what manner it is proposed to encounter some of the difficulties which would seem to oppose this part of the general design.

At present, the whole convict discipline of Norfolk Island is under the charge of an officer engaged in the trial of a series of experiments suggested by himself. For reasons in no degree incompatible with the respect due to that gentleman, it is proposed to relieve him from that charge. An officer to be called the superintendent or commandant of Norfolk Island, will proceed to that place as soon as may be practicable, and will be the bearer of detailed instructions for his guidance in the discharge of his official duties.

This officer will, however, be placed under the immediate authority of the Governor of Van Diemen's Land. For that purpose the island will be detached from the Government of New South Wales, and annexed to the Van Diemen's Land Government.

To make clear room for the commencement of the new system at Norfolk Island, it will be necessary to remove from that place to Van Diemen's Land a large proportion of the prisoners who are already in confinement there. Such of them as were convicted in the United Kingdom should be thus disposed of, together with so many of

those convicted in New South Wales or Van Diemen's Land as Captain Maconochie, from his knowledge of their characters and conduct, may deem entitled by such a transfer, to be relieved from the severer discipline which will hereafter be introduced in Norfolk Island. When arrived at Van Diemen's Land, the present convict population of Norfolk Island should either be sent to Port Arthur, or placed in such one of the classes of convicts at Van Diemen's Land as may be most appropriate to the case of each person.

A proper military force will be stationed at Norfolk Island, and the convicts there will be employed under the direction of an officer of the Ordnance, in any necessary repair or enlargement of the barracks for the reception of that force. They will also be employed in preparing the necessary lodging for the reception of the total number of convicts whom it is intended to place on the island. Agricultural labor for their own subsistence will, of course, be an occupation which must be deemed of primary importance.

Norfolk Island must be regarded exclusively as a place of confinement. No person must be permitted to dwell there except the convicts, the persons employed in the superintendence of them, the families of those persons, and the military. The commandant must be armed with summary power to remove all persons who are not either convicts undergoing their sentence, or military in charge over them, reporting of course, to the Governor of Van Diemen's Land for his sanction, every such proceeding. These powers must be imparted to the commandant by law, and for that purpose an enactment must be proposed to the Legislative Council of Van Diemen's Land.

I anticipate that the total number of convicts who will be annually sent from this country to Norfolk Island will not exceed 1000, and that the total number of such convicts who will be ever resident there at any one time will not much exceed 3000. Some addition may be made by convicts sent to Norfolk Island from New South Wales or Van Diemen's Land. The number will not probably be large. But although any such Australian convicts may be detained at Norfolk Island until they shall have become

entitled to the probation pass, hereafter described, they must, on becoming so entitled, be removed to undergo the subsequent stages of punishment, the Van Diemen's Land convicts in New South Wales, and the New South Wales convicts in Van Diemen's Land.

The second stage of punishment is that of the probation gangs. These gangs will be assembled in Van Diemen's Land. They will be composed first of convicts who have passed through the period of detention at Norfolk Island, and secondly of convicts sentenced to transportation for a less term than life, who may be indicated by the Secretary of State for the Home Department as proper to be placed in this class. The probation gangs will be employed in the service of the Government, and, with rare exceptions, in the unsettled districts of the colony. No convict placed in the probation gang will pass less than one, or more than two years there, except in case of misconduct. Here, as in the case already mentioned, a cotemporary record should be preserved of the good or the bad conduct of the convict. Of good conduct the reward would be earned in the ulterior stages of his punishment. His bad conduct would be followed by the penalty of detention for a proportionate period in the probation gang.

The probation gangs will be employed in hard labor. But the labor of all should not be equally hard. Every gang should be broken into two or three divisions, distinguished from each other by such mitigations of toil or other petty indulgences as may be compatible with the condition of criminals suffering the punishment of their offences. By transference of the men from one of these divisions to the other, an effective system of rewards and penalties might be established, of which the enjoyment or the terror would be immediate. This system appears to be already in operation in Van Diemen's Land, and the regulations generally, in which, of course, modifications may from time to time be made by the local authorities, seem well adapted to their object.

An officer hereafter to be more particularly mentioned, who would have the title of Comptroller of Convicts, will have the general superintendence of the probation gangs,

and at his suggestion alone will relaxations or indulgences be granted to any member of them.

My present estimate is, that provision ought to be made for placing the probation gangs in Van Diemen's Land on a footing which will admit of the maintenance and employment of a number of convicts at one time, amounting to 8,000. This large number of prisoners may be divided as at present, into gangs of from 250 to 300 men each. They must be huted, or quartered in situations where they can undertake and execute in concert, works of public utility. With a view to co-operation in such works and in order that they may live under one common superintendence and control, their settlements must be in the vicinity of each other; while, on the other hand, that vicinity must not be so close as to admit of easy communication between different gangs, or any concert between them to resist the authority under which they are placed.

In subordination to the comptroller there will be employed, for the superintendence of the probation gangs, first, religious teachers, being clergymen of the Established Church or Wesleyan methodists, or Roman-catholic priests. Every such teacher will be liable to immediate suspension from office by the comptroller, subject to the Governor's ultimate decision.

There will also be attached to each probation gang an overseer, with such subordinate officers as may be necessary for giving effect to his authority. But until the comptroller himself shall have been appointed, I shall abstain from entering upon any detailed statement of the extent of this establishment.

It will be the duty of the comptroller to establish all necessary rules for the employment of the probation gang. All such rules must be laid before the Governor, who will be authorized either to disallow them altogether, or to suspend the execution of them provisionally.

Weekly returns will be made by every overseer and by the religious teacher to the comptroller, in which report a statement is to be comprised of the good or bad conduct of every member of each of the probation gangs. From such reports will be compiled periodically some account of the character of each man, reduced to some scale of

numerical notation, from which may at any time be drawn an estimate of the claims of each on the indulgence of the Crown, or of the just liability of each to an enhanced rigor of punishment.

After a convict shall have passed through the probation gang, he will next proceed to the third stage of punishment, and become the holder of a probation pass. But no convict may enter on this stage except on two conditions. Of these, the first is the obtaining from the comptroller of convicts a certificate of general good conduct, to be drawn from the records already mentioned; and secondly, the having fully served in the probation gang during the whole of the period for which the convict had been placed there.

The essential distinction between the third stage and those which preceded it will be that the holder of a probation pass may, with the consent of the Government, engage in any private service for wages, such wages to be paid and accounted for as subsequently mentioned.

The contract for private service is to be void unless made with the Governor's sanction, either previous or subsequent, and is, by the terms of it, to be terminable at the Governor's pleasure.

The holders of probation passes are to be divided into three classes. The difference between the members of the three classes will consist in the different rules under which they will be placed regarding their hiring and wages. Those who may be in the first or lowest class must obtain the previous consent of the Governor to any contract of service. Those who are in the second or third classes may engage in any service without such previous sanction, provided that the engagement be immediately reported to the Governor for his subsequent sanction. Again the members of the first class will receive from their employers one-half only of their wages; the members of the second class two-thirds only of their wages; but the members of the third class the whole of what they may so earn. The wages kept back from the members of first and second classes must be paid by the employer into the savings bank. For the expenditure of the wages actually paid to him, the holder of the probation pass, of whatever

class, must account when required by the comptroller of convicts, or by any person acting under his authority.

The holders of probation passes are to be arranged in the three classes already mentioned by the Governor, at his discretion. He will have regard to length of service, to good or bad conduct, and to every other circumstance which should influence his decision; and he may, if he shall see cause, degrade the holder of such a pass from a higher to a lower class.

In case of gross misconduct, the Governor may resume the probation pass, and send back the convict to serve in the probation gang. But whenever he shall have recourse to any such exercise of authority, it will be his duty to make a special report to the Secretary of State for his information, and for his sanction of the proceedings.

The proportion of the wages earned by the holder of a probation pass, and paid by the employer into the savings bank, is there to be detained until the convict shall have been transferred into the class of holders of tickets of leave, when, and not before, it is to be paid over to the convict. But in the event of a convict forfeiting his probation pass by misconduct, the whole amount of the deposit is to be forfeited to the queen. It will in each such case remain to be determined how far any part of the forfeiture may be subsequently remitted in favor of the convict himself in case of amendment, or in favor of his family if the convict should die before any remission of the forfeiture.

If the holder of a probation pass should be unable to obtain employment in any private service, he must return to the service of the government, to be employed without wages, receiving merely the ordinary rations of food and clothing. Such persons will not be worked in company with convicts in the probation gangs, nor will they be continued in the service of the government after they can obtain an eligible private service.

Holders of probation passes thus lapsing into the service of the government, must not be so employed, except in one or the other of the two following modes; that is, either, first, in the making and repair of roads, or secondly, as members of jobbing parties hired out by the govern-

ment, for the performance, under the direction of the comptroller of convicts, of agricultural labor for the behoof of some private person. Such jobbing parties for the performance of rural works by contract are to be composed exclusively of the holders of probation passes. The contracts are to be made by the comptroller, and all the earnings of the jobbing parties so employed are to be paid to the commissariat chest, to the credit of the Lords of the Treasury.

The prohibition of employing the holders of probation passes in the service of the government for hire, or of so employing them in any other mode of labor than one or the other of the two modes already indicated, must be considered as a peremptory and inflexible rule.

The holders of probation passes will be incompetent to maintain any suit or action against any person whatever. But at the instance of a person so situated the comptroller of convicts will sue his employer, if necessary, for the amount of any wages earned by the convict and unpaid. The holder of a probation pass will, in like manner, not be liable to any civil suit or action by any person. If the pass-holder should be indebted to his employer in any sum of money, the employer may, with the consent of the comptroller of convicts, but not otherwise, pay himself the amount of that debt by withholding from the convict any proportion of his earnings which, according to the preceding regulations, may be payable to the convict himself.

The holders of probation passes are all to be placed under the special superintendence of some magistrate residing in the district within which such pass-holders may be employed. Every pass-holder is to be inspected by such magistrate once at least in each month, and the magistrate is to make monthly reports to the comptroller of convicts of the result of every such inspection.

There is no absolute limit, saving only the continuance of the sentence, which must necessarily terminate the continuance of a convict in the class of holders of probation passes. The transition from that class into the class of holders of tickets of leave, is always to be a matter of grace and favor, and never a matter of strict right.

The fourth stage through which the convict must pass before obtaining a pardon is, that of the holders of tickets of leave. The essential condition of this class is, that they possess what may be termed a "probationary and revocable pardon," valid in the colony in which it is granted, but of no avail elsewhere.

No convict can obtain a ticket of leave before half of the term of the original sentence shall have expired. In the case of persons sentenced for life, that indefinite term shall, for the purpose of this computation, be counted as twenty-four years.

Further, no person may be transferred from the class of probation pass-holders into the class of ticket-of-leave holders, until he shall have held the probation pass for a term equal to the difference between half the sentence and the shortest period at which, under that sentence, the convict might have arrived at the stage of a probation pass-holder. The rule thus stated with a view to precision, will at first sight appear obscure. An illustration will dispel that obscurity: Thus, suppose the case of a convict for life, or, as has already been explained, for twenty-four years; half of his sentence is twelve years; the shortest period at which, under his sentence, such a convict could have reached the stage of a probation pass-holder, would be six years, for he must have passed four at Norfolk Island, and two in the probation gang. Deduct those six years from the twelve years already mentioned, and there will remain six years; during which the convict must, according to the rule already given, hold his probation pass. More briefly, it may be stated thus, namely, that one-half of the term of the sentence must be passed in one or other of the three first stages of punishment. But supposing that by misconduct the length of the first or of the second stage may have been increased, no decrease will on that account be permitted in the third stage; on the contrary, in the case supposed the whole term of punishment in the three first classes would endure for a greater period than one-half of the original sentence.

The fifth and last stage which a convict can reach during the continuance of the term of his sentence is, that of

a pardon, conditional or absolute. It is almost superfluous to say that no one will be able to claim a pardon of right, but that it must in every instance be an act of pure grace and favor.

Pardons may be granted either by the queen directly, or by the governor in the exercise of the royal prerogative delegated to him for that express purpose. Her majesty will not, of course, fetter her own discretion as to the exercise of this power in favor of any convict during any stage of his punishment. But the delegation of the royal prerogative to the governor will be made in such terms as to deprive him of the power of granting pardons until the prescribed period of punishment in the three first stages shall have been undergone; nor will a pardon granted by the governor be of any avail beyond the limits of the Australian colonies. No convict will be capable of this indulgence until he shall have reached the stage of the holder of a ticket of leave.

Reverting to the arrangement already mentioned, it remains that I should indicate what are the legal instruments to be completed, and what are the official appointments and arrangements to be made, before the general principles already stated can be completely carried into effect, and the specific rules already laid down can be fully executed.

Under this head I have first to refer to the case of those convicts to whom expectations of a mitigated punishment have already been held out. To clear the ground effectually for the introduction of the system which it is proposed to introduce, the first step will be, to satisfy all the reasonable expectations which have already been excited, that so the convict population in future may be brought, without any exception, within the reach of the same general system of discipline. The Governor of Van Diemen's Land will therefore be authorized to make in favor of those prisoners who have passed through the first stage of probation in the gangs such relaxation of the penal discipline as he may deem expedient. The time so passed will be taken as part of that which they would otherwise be required to pass as holders of probation passes. They will be admitted into the class of probation

pass-holders as soon as the necessary change of the law shall permit them to acquire that indulgence.

Further, the rules already laid down are not to have a retrospective operation to the prejudice of those convicts already in the colony who may have conducted themselves so as to entitle them to expect the benefits held out under the existing regulations. In their favor the governor will be authorized so far to relax and mitigate the new system, as not to disappoint the hopes which they have been encouraged to form.

Thus much being provided for the past, it remains to consider how security can be best taken for the accomplishment of the future objects to which I have referred.

In the first place, a change in the statute law of this country will be necessary. Her majesty's government propose to recommend to Parliament to alter the statute 2 & 3 Will. 4, c. 62, so far as to vest in the queen the power of regulating whatever relates to the length of service, and the acquisition of property, by transported convicts.

A change in the royal commission and instructions will also be necessary, in order to define with greater precision the extent to which her majesty's prerogative of mercy will hereafter be delegated to the Governor of Van Diemen's Land. It may be requisite that a new and perhaps an enlarged establishment should be formed for the reception and management of convicts in Norfolk Island, and in Van Diemen's Land. I have already intimated that in Van Diemen's Land an officer is to be appointed with the title of "Comptroller General of Convicts." His duty will be to superintend the whole of this branch of the public service, acting, of course, in subordination to the governor, and according to the instructions of her majesty's government. The comptroller will not communicate with the governor through the colonial secretary, but directly, and in his own person. He will in effect be very nearly a second colonial secretary for this particular branch of the public service. He will be dispatched from this country, and will be paid by the lords of the treasury. Subordinate to the comptroller will be the whole body of officers employed in the convict department, whether for

the education or the religious instruction of the convicts, or as overseers, or otherwise.

It will be the duty of the comptroller to draw out and submit to the governor detailed regulations for the employment of the probation gangs, and otherwise for giving complete effect to the system already described. No such regulations will take effect without the governor's previous sanction. A periodical report must be transmitted by the comptroller, through the governor, to the secretary of state, of the condition of the convicts—of the working and progress of the system—of any defects or errors which experience may bring to light—of the best means for correcting and amending them—of the state and efficiency of the convict establishments, and of the expense connected with them—and of the methods by which economy and efficiency may be most effectually promoted. Great importance will be attached to the discharge of this duty with punctuality, exactness, and perspicuity, and it will be the especial duty of the comptroller to draw up his periodical reports in a plain and methodical form, conveying all the requisite statistical information unembarrassed by any speculative disquisitions, and to support every recommendation for any amendment of the system, by a clear and brief exposition of the reasons, and by as minute an estimate as possible of the pecuniary and other consequences attendant on any such change.

Such is the general plan of convict discipline which I have to prescribe for your guidance. Until the contemplated Act of Parliament shall have passed, the new Royal Commission and Instructions issued, the requisite local laws enacted, and the proposed appointments made, you will, I am aware, be able but very imperfectly to execute these instructions. Immediate preparation may, however, be in progress for the execution of them, and especially it will be your duty to avoid, in future, raising any expectations or adopting any measure which would interfere with the introduction of this system at the earliest practicable period.

I have, &c.
(Signed) STANLEY.

COPY of a DISPATCH from Lord Stanley, to
Lieutenant-Governor Sir John Franklin.

Downing-street, 25 November 1842.

SIR,

In my dispatch of this date, No. 175, I have communicated to you very fully the views of Her Majesty's Government as to the future conduct of the system of transportation in reference to male convicts. An equally important, and in some respects a more difficult subject, is the application of the same sentence to the cases of female convicts.

The difficulties are greater, inasmuch as those with whom we have to deal are in general fully as depraved as the male convicts, while it is impossible to subject them to the same course of discipline; and thus no alternative seems to be left but either to detain them in actual confinement, or to permit them to enter, in some mode or other, into the mass of the population, where the knowledge of their former characters subjects them to continual degradation; and having neither sound principles, nor feelings of self-respect to protect them, and surrounded by peculiar temptations arising out of the peculiar state of the population, it is hardly to be wondered that they become, with few exceptions, at once reckless and hopeless, and plunge deeper and deeper into misery and crime.

Looking to the alarming disproportion which exists, and must continue to exist, in Van Diemen's Land between the sexes, it would obviously be the policy and the wish of the Government to carry into actual execution the sentence of transportation on females as generally as possible: but I cannot but feel that the Government are bound, at the same time, to give to these unhappy beings every chance for reformation, and that they incur a serious responsibility by inflicting upon them a sentence which rather furnishes additional incentives to vice, than encouragement and facilities for reformation; and I am compelled to express my fears that female transportation, as it has hitherto been conducted, has partaken more of the former than of the latter character.

According to the present system, it appears that on the arrival of a female convict ship, notice is given to parties desirous to apply for assigned servants; and that the females so applied for are immediately transferred to the service of their employers, while the remainder are detained in the female factory.

It may appear extraordinary, looking to the great scarcity of females, and the great demand for their services in Van Diemen's Land, that there should, in ordinary circumstances, be any "remainder" left upon the hands of the Government; yet I am informed, that not only is this the case, but that great difficulty is experienced in disposing of these females. If this be so, it is a fact which marks most strongly the general feelings of the population, and the almost insuperable difficulties with which these poor creatures have to contend in the attempt, if ever made, to return to a better and more respectable line of life.

The system of assignment in regard to male convicts has been loudly and unequivocally condemned; I confess, I think myself, too loudly and too indiscriminately, though I am not insensible to the many and obvious objections which may be urged against it. But whatever these objections may be, they apply with at least equal weight to the case of females, aggravated, as it seems to me, by other and peculiar objections, which will readily suggest themselves. I have no doubt that the local government do their utmost to throw the shield of their protection around these women; but the difficulty of obtaining admission for them into respectable situations is notorious; and assigned to the less scrupulous and less moral portion of the community, it is not unreasonable to suppose that they must be continually exposed to criminal solicitation, to grievous oppression, and often to personal violence; while, from their previous character, little confidence is placed, or can be placed, in the truth of their complaints, if they should venture, or be disposed to complain to superior authority.

Yet I am unwilling to believe but that even among these women there are some, perhaps even many, who may be capable of better things; on whom instruction, careful superintendance, and, above all, the stimulus of hope,

might work beneficial effects, and make their sentence, instead of being a curse to themselves and to the colony, contributory to the advantage and benefit of both.

But in anxiously considering this question with my colleagues, we are decidedly of opinion that no real amount of good can be effected, without putting an absolute stop to the system of assignment of females; and I am therefore to convey to you the instructions of Her Majesty's Government, that you do not permit the future assignment of any female convicts who may arrive subsequent to the receipt of this dispatch, or who may not have been already assigned.

I am aware that this may occasion, in the first instance, some, and perhaps a considerable increase of expense; but Her Majesty's Government are of opinion that the interests involved are too important and too urgent, to allow such considerations to interfere with the immediate adoption of a system recommended by motives of justice and humanity.

You will therefore consider yourself authorized, in respect of females who may hereafter arrive, either to hire buildings for their confinement and superintendence apart from those who are already in the colony; or, if that cannot be accomplished at a reasonable expense, to detain the convict ship in which they may arrive, and in which some arrangements will have been made for their classification, and to allow them to remain on board until you shall be able to effect more permanent arrangements.

All accounts which I have received concur in representing the state of the female factories at Hobart Town and Launceston as exceedingly discreditable; as crowded to such an extent, as not only to have rendered it necessary to abandon all attempts at employing the greater portion of the prisoners, but as defying all classification, and subjecting every class of offenders to the contamination of mutual bad example, in rooms so crowded, that, according to very high authority, it has occurred that the whole of the prisoners have been unable to lie down at one time, and that a portion have been kept standing while others rested.

In these factories are confined convicts who are unable

to obtain assignments, together with those who have been returned from assignment for the purposes of punishment, and those who being with child from illicit connections are thrown back on the hands of the government; and who, after their delivery, and being attended to at the public expense, again go forth, leaving their children a burthen on the public through the whole period of infancy and childhood, to return again in many cases, under similar circumstances.

This is a system which it is necessary altogether to remodel; while it continues, the evil which it engenders is constantly perpetuating and increasing itself. No respectable person will take a servant out of such a school: those who go out from it, go out to all sorts of temptations and vice, and again return, adding by their numbers to the crowds which render discipline impossible, and by their language and example, to the mass of vice which prevents the inmates from being healthily absorbed into the population.

I proceed to state to you the manner in which Her Majesty's Government propose to deal with a state of things so fearful, and requiring so urgently a prompt and effectual remedy.

It is our intention that measures should be adopted, with the least possible delay, for the construction, in a healthy situation, inland, and at a distance certainly not less than twenty miles from Hobart Town, of a penitentiary, upon the most approved plan, capable of containing at least 400 female prisoners. Instructions have been given to the Inspectors of Prisons in England to prepare the plan of such a building, which will be constructed at the expense of the Home Government. Immediately on the receipt of this dispatch, you will in concurrence with your council, institute inquiries as to the best site for such a prison; taking into consideration the healthiness of the situation, constant and easy access to good water, facilities of transport of building materials, and especially the neighborhood of stone and timber; but above all, the former. When, in conjunction with your council, you shall have decided on the site, you will immediately report to me your selection, and the reasons which have

influenced you in making it; but you will not think it necessary to await my approval before you commence such preparations as do not require that you should have the plan before you. It is necessary, therefore, that I should impress upon you the propriety of well considering every circumstance, before you incur the responsibility of making a selection on which so much depends.

When you shall have decided, you will communicate with the director of the probation gangs, and remove thither as large a number of convicts as can be safely housed and usefully employed, and occupy them in felling timber, quarrying stone, and all the more laborious work which will be required for the construction of the new penitentiary.

When the plans shall have been furnished to Her Majesty's Government and approved by them, they shall be sent out, together with such persons as it may be thought proper to select here for the purpose of superintending their execution.

To this penitentiary, when completed, it is the intention of Her Majesty's Government, that every female convict on her arrival, without exception, should be sent for a period of not less than six months.

It is hoped that considerable improvement has of late taken place in the management and discipline of female convict ships. It will be the endeavor of Her Majesty's Government still farther to improve the reformatory system on board, and to continue it, and keep alive the good feelings which it may have produced, after the arrival of the convicts on shore. I shall, in conjunction with the Secretary of State for the Home Department, endeavor to engage the services of competent persons to undertake the superintendence of this new establishment, who will be furnished with detailed rules for their guidance and for the conduct of the penitentiary, in which we shall endeavor, as much as possible, to surround the convicts with attendants of their own sex.

I have already stated to you the intention of Her Majesty's Government to apply to Parliament without delay for an amendment of the Act 2 and 3 W. 4, which has hitherto prevented the issuing of tickets of leave to female

convicts until the expiration of a considerable period of their sentence. We propose, when that act shall have been amended, that every female convict who shall have conducted herself properly on board ship, and during the six months of her imprisonment, shall obtain, not a ticket of leave in the first instance, but a probation pass, upon the same principles which I have already explained to you in reference to the male convicts; that the contract of service shall be entered into at the penitentiary itself, with the consent of the convict, and subject to the approbation of the governor. It will be expected that in all cases the employer should be bound to afford to the convict his personal protection in removing her to the place of her service.

During the whole period of the six months constant reports will be made, and retained, as to the conduct of the prisoners; and no prisoner will be allowed the privilege of a probation pass, unless her conduct on the whole shall have been satisfactory. It may be superfluous for me to add, that it is intended to regulate the gradual advance of the females through the stages of probation passes and tickets of leave, on the same principles which are directed to be applied to male convicts; with the same inducements to good conduct, and similar penalties attached to bad, during each stage of the process.

It is hoped, and believed, that by regulations such as I have described, an incentive to good conduct will be held out to the convict from the very first, in the hope not only of escaping from the coercion of prison discipline, but in that, which she can hardly have in any case under the present system, of redeeming her character, and being re-admitted, after a graduated system of probation, into respectable and virtuous society.

We hope also, that the knowledge of these precautions on the part of the government will tend materially to diminish the reluctance of respectable colonists to engage the services of female convicts; a reluctance which it is obvious, on the present system, nothing but absolute necessity can overcome on the part of any persons with whom it can be desirable to place the convicts. We are the rather led to indulge this hope, because we are in-

formed, on the high authority of the late colonial secretary, that there is even now no difficulty in obtaining employment for females with tickets of leave; and that the instances are very rare in which tickets of leave have been again forfeited by females who have been fortunate enough to obtain them.

However painful may be the condition of those unhappy women who may now be under going the sentence of transportation, I feel it absolutely essential to the hopes of success under the new system, that no transfer should take place from the existing factories to the intended penitentiary; at the same time, I am very anxious that the inmates of the former should not be left in their present hopeless condition; and I have therefore to instruct you to cause immediate inquiry to be made into the present state of the factories both at Hobart Town and at Launceston, and to endeavor to ascertain the practicability, even in their present crowded condition, of improving the classification, and effecting a more complete separation between those who may seem wholly irreclaimable and those of whom better hopes may be entertained. You will be authorized to hold out to the latter and even to the former, the hope, that when the law allows it, probation passes, the nature of which you will cause to be explained to them, may be granted to them, but that such indulgence, and still more the higher one of tickets of leave, will be dependent wholly on their conduct, and on their ability, consequent on such conduct, to obtain employment.

If you shall succeed by these means in diminishing the existing pressure on the factories, you will endeavor, by improved arrangements, to make them, what I fear they are not now in any degree, places at once of punishment, of employment, and of reformation; and you will constantly bear in your own mind, and endeavor to impress on those of the convicts, that while the degradation of assignment is finally put an end to, the privilege of employment in private service can only be the consequence, the reward, and the encouragement of good conduct.

When the new system shall be in operation, it is to be understood that the penitentiary about to be built is to be devoted exclusively to the newly arrived; that the places

of punishment will be the factories; and that those who having obtained probation passes, or tickets of leave, will, if they forfeit them, be returned, not to the penitentiary, but to the severer discipline of the factory; for the regulation of which, in such a sense, it will be necessary to provide.

Under the system which we propose, it is calculated that six hundred females annually may be expected to pass through a penitentiary capable of containing four hundred at one time; and should it happily succeed, as, with God's blessing, we may reasonably hope that it may, the government will act on the principle of carrying into effect, almost universally, the sentence of female transportation, in the belief that by so doing, under proper restrictions, they will be conferring a benefit on the colony, at the same time that they give to the convicts themselves the best prospect of regaining character and station, both of which in this country would be merely hopeless, and, I fear, at present even more so in Van Diemen's Land.

I have not entered in this dispatch into minute details. I have rather desired to put you fully in possession of the views and intentions of Her Majesty's Government as to a system which cannot be brought into immediate operation, but for the adoption of which it is desirable that immediate preparation should be made; and I feel assured that the vital importance of the subject will render it quite unnecessary for me to commend it to your immediate and anxious attention.

(Signed)

I have, &c.
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